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a year, and for that one year I propose to exact my salary, and compel you, regardless of your wishes, to submit to my management and my dictation, to my manners and my methods, in running this hotel. I care nothing for your guests or your hotel enterprise; as *chef* for one year I propose to remain?" It may be argued that the masters in this case were fully protected under the general rule governing master and servant from any such theory as this; that, when he failed to perform his services promptly as *chef* of that hotel, the law would protect the defendants in discharging him. I claim, in answer to this, that it is the right of the defendants under the contract and the law to determine when that service is satisfactory, and when it commenced to be unsatisfactory. In Zaleski v. Clark, 44 Conn. 223, Carpenter, J., says: "Courts of law must allow parties to make their own contracts, and can enforce only such as they actually make. Whether the contract is wise or unwise, reasonable or unreasonable, is ordinarily an immaterial inquiry. The simple inquiry is, what is the contract, and has the plaintiff performed his part of it?" This was a case where the plaintiff undertook to make a bust which should be satisfactory to the defendant. "The case shows," to use the language of the judge writing the opinion, "that she was not satisfied with it." Hence the plaintiff has not yet fulfilled his contract. "It is not enough to say that she ought to be satisfied with it, and that her dissatisfaction is unreasonable. She, and not the court, is entitled to judge of that. The contract was not to make one that she ought to be satisfied with, but to make one that she would be satisfied with." It seems to me that this reasoning is applicable to the case at bar. In Brown v. Foster, 113 Mass. 136, Devens, J., rendering the opinion of the court, said: "There was evidence at the trial to show that the contract between the parties was an express contract, and by the terms of it the plaintiff agreed to make and deliver to the defendant, upon a day certain, a suit of clothes, which were to be made to the satisfaction of the defendant. The clothes were made and delivered upon the day specified, but were not to the satisfaction of the defendant, who declined to accept, and promptly returned, the same. . . . And, even if the articles furnished by him were such that the other party ought to have been satisfied with them, it was yet in the power of the other to reject them as unsatisfactory. It is not for any one else to decide whether a refusal to accept is or is not reasonable, when the contract permits the defendant to decide himself whether the articles furnished are to his satisfaction. . . . When an express contract like that shown in the present case was proved to have been made between the parties, it was not competent to control it by evidence of usage. It may be that the very object of the express contract was to avoid the effect of such usage, and no evidence of usage can be admitted to contradict the terms of a contract, or control its legal interpretation and effect." In the case of Daveny v. Shattuck, 9 Daly, 66, it was held as follows: "A servant was employed upon trial for a week, with a promise that, if she suited, the employment would be continued through the summer months, and until September 1st. Before the end of the week, the employer having declared that she suited, the servant said: 'Then, as long as I suit you, there is no fear for the summer months;' to which the employer responded affirmatively. Held, that there was not an absolute employment until September 1st, but merely a conditional one, dependent upon the servant continuing to suit the employer." In the case of Evans v. Bennett, 7 Wis. 351, it was held that, "when one party agrees to work for another at a certain rate of wages per month, and either party is at liberty to put an end to the agreement at any time, the servant is entitled to recover at the stipulated rate for the time he serves, though he quits of his own motion." The foregoing case is certainly analogous to the case at bar, with this exception: that in that one there was no written contract, but an oral agreement, and in this case there is a written agreement—an express contract—whereby the individuals obligated themselves—First, the plaintiff to render satisfactory services; and second, for which services so satisfactorily rendered the defendants are bound to pay at the rate nominated in the agreement for the period of one year.

CARRIERS OF PASSENGERS—FORFEITURE OF TICKET—PAYMENT OF FARE.—In Manning v. Louisville & Nashville R. Co., the Supreme Court of Alabama decide that a regulation of a railroad, whereby a passenger who has forfeited a ticket providing for a continuous passage, but who has been carried almost to his destination before the mistake is discovered, is required to pay fare not only for the remaining distance, but for that which has already been traveled since the forfeiture of the ticket, is a reasonable regulation; and the passenger cannot recover on being ejected for refusal to pay such fare. Stone, C. J., says:

Plaintiff purchased an excursion ticket to and from New Orleans from defendant's ticket agent at Birmingham. He obtained it at reduced rates, but on certain conditions as to its use, which were printed on the ticket, and subscribed by him. Plaintiff testified that he had read the conditions. Among them are the following: "In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree with the Louisville and Nashville Railroad Company as follows: That on the date of my departure, returning, I will identify myself as the original purchaser of this ticket, by writing my name on the back of this contract, and by other means, if required, in the presence of the ticket agent of the Louisville and Nashville Railroad Company at the point to which this ticket was sold, who will witness the signature, date, and stamp the contract; and that this ticket and coupons shall be good returning only for a continuous passage from such date, and in no case later than the date canceled in the margin of this contract." Plaintiff conformed to all the requirements of this contract until he reached Mobile on his return trip. At that place he stopped off one day. At the end of that time he boarded another train of the railroad at midnight, and took a berth in a sleeping car. He proceeded unmolested on his homeward trip until he passed Montgomery, and was nearing Calera, less than 40 miles from Birmingham. At that stage of his journey the conductor in charge of the train discovered he was traveling on a forfeited ticket, but possibly did not learn he had so traveled before he reached Montgomery. As a condition of his proceeding further the conductor exacted of him that he should pay fare from Montgomery to Birmingham, or, failing, that he would be put off the train at the next station, which would be Calera. Reaching Calera, plaintiff procured

from the ticket agent at that place a ticket to Birmingham' and upon that ticket sought to continue his journey on the same train. This the conductor refused to allow him to do, stating that under the road's regulations he could not permit him to proceed unless he would also pay the back fare from Montgomery. This he failed to do, and was ejected from the train. The present action is brought to recover damages for such ejection.

A regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be traveled, but also for the part already passed over, is certainly a reasonable one. If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for an attempted undue advantage of the railroad? The regulation needs no argument to uphold its reasonableness. The authorities are uniform, and very abundant, that the conductor was authorized to demand fare, not only for the portion of the road yet to be traveled, but equally for that part of the road plaintiff had been carried, after his ticket had become *functus* by virtue of his stop over. And the conductor was fully justified in ejecting Manning from the train on his refusal to pay the fare as demanded. 3 Wood, Ry. Law, § 361, p. 1433; Wheeler, Carr. 174; Hutch. Carr. (2d Ed.) § 580*a*; Hill v. Railroad Co., 63 N. Y. 101; State v. Campbell, 32 N. J. Law, 309; Swan v. Railroad Co., 132 Mass. 116; Davis v. Railroad Co., 53 Mo. 317; Stone v. Railroad Co., 47 Iowa, 82; Hall v. Railroad Co., 15 Fed. Rep. 57; Pennington v. Railroad Co., 18 Amer. & Eng. R. R. Cas. 310; Pickens v. Railroad Co., 104 N. C. 312, 10 S. E. Rep. 556; Railroad Co. v. Gants, 38 Kan. 629, 17 Pac. Rep. 54; Johnston v. Railroad Corp., 46 N. H. 213; Rose v. Railroad Co. (N. C.), 11 S. E. Rep. 526. Plaintiff (appellant here) relies on Ward v. Railroad Co. (Sup.), 9 N. Y. Supp. 377, as an authority in his favor. The ticket in that case was an ordinary one, and had no clause or stipulation requiring or looking to continuous passage. The decision is rested on the absence of that provision. It refers to and approves many of the decisions we have referred to above, pronounced on contracts requiring continuous passage. Properly interpreted, that case is an authority against appellant. In Railroad Co. v. Carmichael, 90 Ala. 19, 8 South. Rep. 87, we took occasion to comment on the great importance, the public necessity, of wisely observing regulations in the running of trains on railroads. We need not repeat what we there said.

OPINION EVIDENCE — VALUE OF SHADE TREES.—In Andrews v. Youmans, 52 N. W. Rep. 23, the Supreme Court of Wisconsin decide that where, in the assessment of damages by a jury for the wrongful cutting down of shade trees around a stockyard, a farmer who is acquainted with the premises may be asked as a witness, "What do you consider these fourteen trees worth for shade trees and wind-break connected with the stockyard?" such evidence being that of a non-expert as to matters with which he is personally acquainted. Pinney, J., says:

Ordinarily a witness cannot give his conclusions from facts, but must state the facts, leaving the drawing of conclusions to the court and jury, but an opinion can be given in evidence by a non-expert as to matters with which he is especially acquainted, but which cannot be specifically described. In speaking of the admissibility of such opinions in evidence, Judge Redfield says: "Opinions of witnesses derived from observation are admissible in evidence where, from the nature of the subject under investigation, no better evidence can be obtained. No harm can result from such a rule, properly applied. It opens the door for the reception of important truths, which would otherwise be excluded, while at the same time the tests of cross-examination, disclosing the witness' means of knowledge and his intelligence, judgment, and honesty, restrain the force of the evidence within reasonable limits, by enabling the jury to form a due estimate of its weight and value." Redf. Wills, 136-141. Opinions concerning matters of daily occurrence, and open to common observation, are received from necessity (Com. v. Sturtivant, 117 Mass. 122, 133, 137); and the ground upon which they are admitted in such cases is that from the very nature of the subject in issue, it cannot be stated or described in such language as will enable persons not eye-witnesses to form an accurate judgment in regard to it (De Witt v. Barly, 17 N. Y. 340; Synder v. Railway Co., 25 Wis. 66). No language which an ordinary witness could command, by mere description of the trees in question, and their location on the lot, would serve to convey to a jury the information and assistance in arriving at a just verdict for cutting them down and carrying them away which would be furnished by the testimony of four farmers familiar with the benefits and advantages to be derived from the trees standing on the lot, when used for a stockyard, and who are to be regarded, in fact, as eye-witnesses. They were asked what, in their judgment, was the value of the trees as a shelter and wind-break to the owner of the lot used for the purpose of stockyards. These witnesses had raised and handled stock for several years, and knew the benefits and advantages to be derived from shelter from sun and wind and storm. The question of value could not be itemized or anaylized. The only answer that could well be made was by an opinion or judgment as to a gross sum, and would be an opinion founded on observation and experience. It is always competent to prove value by the opinions of witnesses who have the requisite knowledge, whether the subject be real estate or personal property. Clark v. Baird, 9 N. Y. 183; Kellogg v. Krauser, 14 Serg. & R. 142. The witnesses were not asked to state what damages the plaintiff had sustained by cutting down and taking away the trees. They were asked only, what was the value of the trees to the lot owner for certain purposes. The law in this State has been well settled for a long series of years, in harmony with the authorities cited, which are believed to be the expression of the general rule on the subject, and the question of the admissibility of the evidence in question is settled in this State beyond necessity of further discussion; and we here collate and state some of the principal cases for convenience of future reference. In Watry v. Hiltgen, 16 Wis. 516, witnesses who had examined the field where a trespass by cattle had recently been committed, and who knew the extent of the injury, were asked and allowed, against objection, to state at what sum they estimated the damages occasioned by the trespass, and this court held the objection untenable. In Synder v. Railway Co., 25 Wis. 60, 65, where witnesses were asked and allowed to state what,

in their opinion, was the value of the land actually taken for the use of the railway track, and also whether the residue of the farm was less valuable in consequence of the railway crossing it in the manner it did, and how much the value of the property was depreciated thereby, the objection that the testimony was merely the opinions of the witnesses, and that they should have been allowed only to state facts within their personal knowledge, was held to be not well taken. This case is really decisive of this appeal. In Erd v. Railway Co., 41 Wis. 65, 68, it was held that, where the question of the value of property is involved which has no fixed market value, it is competent for witnesses to state what according to their best judgment or belief it is worth, the jury being the sole judges as to what weight should be given to it; and in Neilson v. Railway Co., 58 Wis. 516, 520, 17 N. W. Rep. 310, the rule laid down in these cases is reaffirmed and applied. In Moore v. Railway Co., 78 Wis. 124, 47 N. W. Rep. 273, it is held that "the opinions of witnesses as to values may be given, without any previous examination as to the grounds of it, or their competency to give it. Then, on cross-examination, they may be asked their reasons, or as to their knowledge of the property, or their competency may be first shown. They are not experts having special skill and experience in a particular trade, business, or profession. They are common witnesses. The value of their opinions depends upon their knowledge of the subject." The case of Blair v. Railway Co., 20 Wis. 262, relied on by appellant, was where, in an action by one of a mercantile firm against a railway company for personal injuries to the plaintiff's person, it was held he could not ask his copartner, as a witness for him, what was the amount of damages to the firm for a specified time, by reason of the plaintiff's absence, occasioned by his injuries. It was held that the witness could not give his opinion as to the amount of damages, but should state facts from which the jury could estimate their amount; that such opinions were mere conjectures, the amount of damages depending upon the nature, character, and extent of the firm's business, the business capacity and activity of the plaintiff, the activity of trade, etc. It will be readily seen that there is no just resemblance between that case and the one under consideration. Wylie v. Wausau, 48 Wis. 508, 4 N. W. Rep. 682, and Bierbach v. Rubber Co., 54 Wis. 208, 211, 11 N. W. Rep. 514, are in substance the same as Blair v. Railway Co., *supra*. The cases of Swan v. Middlesex, 101 Mass. 177, and Sexton v. North Bridgewater, 116 Mass. 207, are in accord with the rule of the decisions of this court. There was no error in admitting the evidence objected to. The judgment of the circuit court is affirmed.

MASTER AND SERVANT—TORTS OF SERVANT.—In Palmer v. Manhattan Ry. Co., 30 N. E. Rep. 1001, decided by the Court of Appeals of New York, after plaintiff had purchased a ticket from a carrier's ticket agent the latter declared that the coin given in payment was counterfeit and demanded that she take it back and return the change he had given her. On her refusal, he publicly denounced her as a counterfeiter and as a common prostitute, and detained her for a while in the station, awaiting arrest by an officer, which was not made. It was held that the agent was acting within the scope of his employment, and the carrier is liable in an action by plaintiff for false imprisonment, and for the slanderous words spoken. The court distinguishes Mulligan v. R. R. Co., 29 N. E. Rep. 952; s. c., 34 Cent. L. J. 279. Gray, J., says:

Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was thereafter sued for false imprisonment. In that case the facts were, briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station, and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police, and thought the bill looked "queer," but nevertheless took it, and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were there on the station platform. The bill was subsequently pronounced to be genuine, and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine; and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employers or his employment required of him. I refer to the case of Mulligan v. Railway Co., 29 N. E. Rep. 952 (decided January, 1892). In the present case, however, the acts of the ticket agent were of a different character. The plaintiff purchased a ticket of the agent at the elevated railroad station, and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money, and demanded another quarter in place of the one given him. She insisted upon her money being genuine, and refused to give another quarter or to hand back the change. He became angry, and called her a counterfeiter and a common prostitute. He placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words, publicly spoken, concerning her. The jury believed her story, and the judgment which she has recovered the appellant seeks to avoid principally upon the ground that the ticket agent was acting outside of the scope of his employ-

ment in doing the acts complained of. The appeal must fail. This is not like the Mulligan Case. Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business intrusted to him the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defense, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases, of which Weed v. Railroad Co., 17 N. Y. 362; Hamilton v. Railroad Co., 53 N. Y. 25; Stewart v. Railroad Co., 90 N. Y. 588; and Dwinelle v. Railroad Co., 120 N. Y. 117, 24 N. E. Rep. 319,—are sufficient instances.

What materially distinguishes the present from the Mulligan Case is that there the servant of the company was not acting for the protection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community, by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business. Whereas here the ticket agent clearly was engaged about the company's affairs, but, in the belief of the jury, unlawfully detained the plaintiff, and insulted her by slandering her character. It is needless to consider the case of Mali v. Lord, 39 N. Y. 381, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched upon suspicion of a theft, and whose general employment could not warrant such an act, and the present case, of an agent who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do what ever is necessary about it. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge Andrews, in Rounds v. Railroad Co., 64 N. Y. 129, points out the distinguishing principle of these cases, and refers to Mali v. Lord in the course of his opinion.

FILING FOR RECORD AS FULL NOTICE.

Where Statute Does Not Say That Filing is Notice.—The rule obtains under all the statutes of registry alike that, when a conveyance has been duly recorded, the record will be held to impart notice from the time the instrument was filed with the proper officer, for the reason that from such time until the recording is actually done the instrument itself remains in the recorder's office subject to public inspection.[1] This rule is here mentioned in order to set it out of the way as not directly affecting the present subject, viz: the effect of the filing where the instrument is afterwards not duly recorded.

In about one-third of the States the recording acts do not declare that the conveyances shall be notice from the time they are filed or delivered for record;[2] and under these statutes it is held by an almost uniform current of decision that the effect of continued notice will not be given to the filing alone; and hence if the instrument, after its filing and before its record, is lost, the effect of notice is destroyed; or if it be erroneously or imperfectly transcribed, the record will impart notice only of what it contains.[3] If a mortgage is to secure a debt of $3,000, and the record shows the amount as only $300, it will be notice to third

[1] Steam Co. v. Sears, 23 Fed. Rep. 313; Nichols v. McReynolds, 1 R. I. 30, 36 Am. Dec. 238; Johnson v. Borden, 40 Vt. 567, 94 Am. Dec. 436; Bigelow v. Topliff, 25 Vt. 274, 60 Am. Dec. 264; Kessler v. State, 24 Ind. 213; Leslie v. Hinson, 83 Ala. 266, 3 South. Rep. 443. Where the statute specifies a time within which deeds may be recorded, the filing, if made within that time, will relate back to the date or delivery of the instrument, and give it priority from such date. Betz v. Mulin, 62 Ala. 365; Phelps v. Barnhart, 88 N. C. 333; King v. Frazier, 23 S. Car. 242; Webb on Record of Title, § 132. If, before the deed is recorded, it be withdrawn by the grantee, the effect of the filing as notice is destroyed (Worcester Bank v. Cheeney, 87 Ill. 602; Johnson v. Borden, *supra*), even though it had been entered on the index (Yerger v. Barz, 56 Iowa, 81); and if it be deposited with instructions not to file it until further orders, or until a certain date, such deposit is not notice, and the filing when afterwards indorsed cannot relate back to the depositing. Haworth v. Taylor, 108 Ill. 275; Town v. Griffith, 17 N. H. 165; Brigham v. Brown, 44 Mich. 59; Webb on Record of Title, §§ 16, 140.

[2] See statutes of Maryland, Delaware, Georgia, Indiana, Iowa, Maine, Michigan, Minnesota, New Hampshire, New Jersey, North Carolina, Oregon, Ohio, Pennsylvania, South Carolina, Vermont, Wisconsin and Wyoming. As statutes are constantly changing, such list cannot be entirely accurate as to early or very late statutes; nor does it apply to chattel mortgages which are usually required to be filed only; and the statute as to recording real estate mortgages is often different from that relating to deeds. This is the case in Ohio and Pennsylvania, where mortgages take effect only from the time they are left or delivered for record. Tousley v. Tousley, 5 Ohio St. 78; Rev. St. (1880), § 4133; Brook's Appeal, 64 Pa. St. 127; Brightley's Dig. (1872) p. 478; Calder v. Chapman, 52 Pa. St. 359.

[3] Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250; Disque v. Wright, 49 Iowa, 538; Bryden v. Campbell, 40 Md. 331; Crosby v. Vleet, 3 N. J. Law, 86; Barnard v. Campau, 29 Mich. 162; Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523; Hodgson v. Butts, 3 Cranch, 155; White v. McGarry, 2 Flipp. C. C. 572; Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459; Jenning v. Wood, 20 Ohio, 261; Smith v. Lowry, 113 Ind. 37, 15 N. E. Rep. 17; Stead v. Grosfield, 67 Mich. 289, 34 N. W. Rep. 871; Frost v. Beekman, 18 Johns. 544; Hill v. McNicol, 76 Me. 314; Insurance Co. v. Scales, 27 Wis. 640; Parrot v. Shanbhut, 5 Minn. 223; Meighen v. Strong, 6 Minn. 177; Potter v. Dooley, 55 Vt. 621; Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; Taylor v. Hotchkin, 2 La. Am. Ann. 917; Speer v. Evans, 47 Pa. St. 141. See also, Wyatt v. Barwell, 19 Ves. 439; Hughes v. Debnamy, 8 Jones, 127; Ford v. James, 3 Keyes, 300; Succession of Falconer, 4 Rob. 7; Benson v. Green, 80 Ga. 230, 4 S. E. Rep. 518.

persons of a lien for only the latter sum.[4] It results from this view of the law that where a subsequent purchaser acquires an interest in property in ignorance of a prior defectively recorded conveyance thereof, his rights in and to the property itself will be held superior to those of the prior grantee, whose remedy is in damages against the recorder. Under this line of decision the rule of notice will not be changed by the fact of the instrument remaining in the office after its erroneous transcription, for, after the record is made, it is alone looked to for information; the instrument no longer belongs in the office, is not inquired for, and hence will not then serve as notice,[5] If the error in transcribing consists in an omission to copy the certificate of acknowledgment, the record will not impart constructive notice; and this has been held in Texas, even though the statute there gives the effect of notice to the filing.[6] The duty of giving notice, and of giving it fully and correctly, is upon the party having the conveyance recorded, and the statute does not protect him until this is done. The recorder and the books of record are but convenient instrumentalities provided by law for the use of those whose duty it is to give the notice.[7] If, however, the notice be given, a subsequent destruction of the public records will not destroy its continuing effect, as the duty then devolves on the State of preserving and perpetuating the public records in such manner as may become necessary.[8] Should the statute require, in such case of destruction, that the parties at interest shall again have their conveyances recorded within a stated time, the former recording will cease to have effect at the expiration of the designated time.[9] A deposit of the instrument with the proper officer is a sufficient filing, whether he then indorses it filed or not;[10] and this rule, as also that relating to destroyed records, obtains in all the States, irrespective of the disputed effect of filing.

Where Statute Declares the Filing to be Notice.—In more than one-half the States[11] the recording acts declare that conveyances shall be notice, or shall be considered as recorded, from the time they are filed or delivered for record; and under these statutes the weight of authority gives the full effect of notice to the filing alone, irrespective of the actual record.[12] The instrument may be lost from the files, or fraudulently or carelessly put aside by the officer without being recorded at all, or it may be recorded in the wrong book,[13] or imperfectly or erroneously transcribed, yet the filing continues to charge the full effect of a correct notice. The statute is literally construed and the fullest effect given it—an effect so complete that, so far as the grantee in the conveyance is concerned, the law of record begins and ends with the filing. He has then done all that the law requires him to do. It is not for his protection, but that of others, that the notice is to be given and the recording done. Aside from the requirements of the registry acts, he would be protected at common law by virtue of the seniority of his title. The subsequent purchaser, when claiming precedence by virtue of the recording statute, is in effect seeking to enforce a species of statutory penalty against the prior grantee; and such statute in derogation of the common law will be given a strict construction as against a forfeiture of the rights of one who has done all that the law imposed on him to do. The State has undertaken to have the recording done for the benefit of the public, and the law has not placed upon the grantee the responsibility of seeing that the officers faithfully discharge their duty in the premises. In a case where one of two innocent parties must suffer because of the recorder's default, the terms of the law must decide the matter, and the subsequent purchaser, for whose protection the officer is appointed to act, must look to him for redress of the injury.[14]

Contrary View and Conflict of Decision.—The courts of a few States whose statutes declare the filing to be notice have reached a different conclusion as to the intent and meaning of the law. Thus, under an Iowa statute of 1839 providing that instruments should "from the time of filing

4 Frost v. Beekman, 1 John. Ch. 288; Gilchrist v. Gough, *supra*. If the deed is recorded in an old, unused book, the record is not notice. Sawyer v. Adams, *supra;* N. Y. Ins. Co. v. White, 17 N. Y. 469.

5 Sawyer v. Pennel, 19 Me. 167: Potter v. Dooley, 45 Vt. 512.

6 Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 303.

7 Ritchie v. Griffith (Wash.), 25 Pac. Rep. 341; Jennings v. Wood, *supra*.

8 Houston v. Blythe, 71 Tex. 719; Meyers v. Buchanan, 46 Miss. 397; Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Armentront v. Gibbons, 30 Gratt. 632; Heaton, v. Prather, 84 Ill. 330; Webb on Record Title, § 187; Franklin Savings Bank v. Taylor, 131 Ill. 376, 23 N. E. Rep. 397; Crone v. Dameron, 98 Mo. 567, 12 S. W. Rep. 251.

9 Salmon v. Huff (Tex.), 15 S. W. Rep. 257; O'Neil v. Pettus, 79 Tex. 254, 14 S. W. Rep. 1065. But a party may be estopped because of his failure to renew or supply the former record. Lee v. Birmingham, 30 Kan. 312, 1 Pac. Rep. 73; Waters v. Crabtree, 105 N. C. 344, 11 S. E. Rep. 240.

10 Houghton v. Burnham, 22 Wis. 301; Metts v. Bright, 2 Dev. & Bat. Law, 173, 32 Am. Dec. 638.

11 All the States not in note 2, with a few distinctions as to terms of the statute, noticed hereafter.

12 Poplin v. Mundell, 23 Kan. 158; Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334; Woodward v. Boro, 84 Tenn. (16 Lea) 978; Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Fouche v. Swain, 80 Ala. 153; Leslie v. Hinson, 83 Ala. 266, 3 South. Rep. 443; Bradford v. Tupper, 30 Hun, 174; Gillespie v. Rogers, 146 Mass. 610, 612; Nichols v. McReynolds, 1 R. I. 30, 36 Am. Dec. 248; Hine v. Roberts, 3 Conn. 347; Bank of Kentucky v. Haggin, 1 A. K. Marsh. 306; Booth v. Barnum, 9 Conn. 286, 23 Am. Dec. 339; Mut. Life Ins. Co. v. Dake, 87 N. Y. 257; Brook's Appeal, 64 Pa. St. 127; Riggs v. Boylan, 4 Biss. 445; Oats v. Walls, 28 Ark. 244; Glading v. Frick, 88 Pa. St. 460; Merrick v. Wallace, 19 Ill. 486; Perkins v. Strong, 27 Neb. 725; Payne v. Pavey, 29 La. Am. 116; Steam Co. v. Sears, 23 Fep. Rep. 313.

13 Lewis v. Klotz, 39 La. Am. 259, 1 South. Rep. 539; Cluder v. Thomas, 89 Pa. St. 343; Swenson v. Bank, 9 Lea, 723.

14 The reasoning in support of this rule is quite fully presented in the cases of Mangold v. Barlow, and Merrick v. Wallace, *supra;* also in the dissenting opinions of Judge Phelps in Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459, and of Judge Spalding in Jennings v. Wood, 20 Ohio, 261, and in 1 Dev. on Deeds, §§ 681-686.

the same with the recorder impart notice to all persons of the contents thereof," it was held that the intention of this language was only to fix the time from which the notice was to commence, and not to make the filing notice after the deed was recorded. The record itself is then the constructive notice of its contents, and it was not the purpose of the law to hold a subsequent purchaser, buying after the recording, bound by the contents of a deed improperly and incorrectly recorded, because at some time a deed correct in the description of the property was filed with the recorder.[15] This view derives great force from a further consideration of the plan and purpose of the registry acts. The manifest design of the law is to provide a permanent record which, as the authentic source of information as to title, shall serve as a general protection of the public interests. Filing is but a preliminary step in the making of such record, and it cannot be justly intended to have the greater and controlling effect. Instruments are taken from the office after being recorded, and third parties must look alone to the records and cannot go back of them. They are to be read and examined for information as to title, and as they cannot in fact and when so examined impart knowledge or notice of what they do not contain, they cannot properly be held to constructively charge such notice.[16] The courts should seek to foster public confidence in the records, and to effectuate the beneficent policy of the registry laws according to their spirit and intent. If, however, the records held out by the law as the means of public protection may so often and so easily prove only a delusion and a snare, public confidence in them cannot be maintained, and the efficient operation of the registry system is impaired thereby. In the case of every conveyance, the protection of the entire public is represented on the one hand as against that of the grantee alone on the other. It is possible for him to see that the recording is actually and correctly done, and hence equity, as well as public policy, forbids that the burden of loss should be thrown on the subsequent purchaser who has usually no means of protection save the records. This equity of the case will be considered further on in connection with the matter of negligence.

Other Decisions and Statutes.—The recording statute of Missouri declares that every instrument "certified and recorded in the manner prescribed, shall from the time of filing the same with the recorder, impart notice," etc., and it is properly held that this statute gives the effect of notice, by relation back to the time of the filing, only where the instrument has been actually and correctly recorded, and that the record is notice only of what it contains.[17] Yet, on the other hand, and on general principles only, it is held in Virginia[18] and North Carolina, under statutes making no special reference to filing as notice, that the grantee has done his full duty in depositing his conveyance for record, and is fully protected thereby.[19] In North Carolina, as the legal title does not pass until the deed is registered, the registration serves an important purpose besides that of notice, and this consideration may have properly influenced the decision of the question there.[20]

The present Iowa statute, differing from the earlier act already noticed, provides for an entry book or descriptive index giving, besides all the *data* usually contained in an index, also a brief description of the property conveyed or affected, and declares that constructive notice shall be imparted from the time of such index entries—the duty of the recorder being to note the conveyance in such index as soon as it is filed for record, and after it is recorded at length to fill in the index the number of the volume and page of its record. The statutes of Wisconsin, Michigan, and Indiana are of similar character;[21] and while these provisions bring up some questions as to the necessity and sufficiency of the index, and its effect in obviating certain errors in transcribing,[22] yet the main question as to the effect of notice where the record if imperfect or erroneous is not necessarily affected by the index feature. These statutes say that the indexing shall be constructive notice, just as other statutes say that the filing shall be notice; and as the descriptive index is in itself a permanent record containing the leading points of information, it could more properly than the mere filing be given the full effect of notice. Yet in these States it is held that an error in the main record, where the index entries do not show or indicate the mistake, vitiates the notice, and the record imparts notice only of what it contains.[23]

15 Miller v. Bradford, 12 Iowa, 14.

16 2 Pomeroy's Eq. Jur. §§ 653, 654.

17 Rev. Stats. Mo. (1889) § 2419; Ferrell v. Andrew County, 44 Mo. 309. "The obligation of giving the notice rests on the party holding the title." *Id.*

18 Beverly v. Ellis, 1 Rand. 102. The grantee, says the court, has no control over the acts of the officer. This case was under the Act of Jan. 18, 1808, providing that deeds should be lodged with the clerk of the court and by him recorded, and should have priority when so filed and recorded according to the directions of the act. The present statutes of Virginia and West Virginia provide that deeds, etc., shall be void as to creditors, etc., until and except from the time they are "duly admitted to record." Code of Va. 1887, § 2494; Code West. Va. 1887, ch. 74, §§ 4-7.

19 Parker v. Scott, 64 N. C. 121; Metts v. Bright, 2 Dev. & Bat. L. 173, 32 Am. Dec. 683.

20 Fortune v. Watkins, 94 N. C. 304. But see as to necessity of enrolling (copying) sheriff's deeds in order to pass title, Bigelow v. Topliff, 25 Vt. 274, 60 Am. Dec. 264.

21 Pub. Acts Mich. 1889, p. 337; Code Iowa, 1888, §§ 3114-3118; Rev. Stats. Ind. 1888, § 2951; Rev. Stats. Wis. 1878, § 758, 759.

22 Without the index, there is no notice. Barney v. McCarty, 15 Iowa, 510, 83 Am. Dec. 428, in which notice by recording is fully discussed by Judge Dillon; Lombord v. Culberson, 59 Wis. 537, 18 N. W. Rep. 399; Noyes v. Horr, 13 Iowa, 590. The index and the full record together constitute the record, and a mistake in one does not usually vitiate if the other gives that matter correctly. Shove v. Larson, 22 Wis. 142; Sinclair v. Slawson, 44 Mich. 123, 38 Am. Rep. 235; St. Croix Land Co. v. Ritchie, 73 Wis. 409, 41 N. W. Rep. 345; Webb on Record of Title, § 143, citing numerous cases.

23 Lowry v. Smith, 97 Ind. 476; Miller v. Bradford, 12

The Equity of the Matter.—The latest cases deciding this question squarely on its merits, and not upon the rule of *stare decisis*, are against the technical construction in favor of the filing as absolute and complete notice, and upon equitable considerations they uphold the record as the true notice. The statute of Washington provides that conveyances shall be notice to all the world from the time they are filed or recorded in the office of the county auditor.[24] Lately in a case arising under this statute, and in which it was held that notice was not given where the record was not indexed, the direct question involved here was exhaustively discussed, and the view ably maintained that the duty of giving notice was on the grantee in the instruments, and that until it was given, he was not protected by the recording act. He employs and pays the officer to do the recording properly, and to him the officer is responsible in damages for the loss resulting from any mistake, failure or negligence of his own in the premises. The subsequent purchaser is not in default, and must rely alone on the record, while the prior grantee has the opportunity of seeing, and is in duty bound to see, that his recording is actually and properly done; and where one of two innocent persons must suffer, the rule is that the misfortune must rest on that one in whose business and under whose control it happened, and who had it in his power to avert it.[25]

Where one party has deposited his deed as required by law, and the literal terms of the statute are in his favor, and the other has examined the records as required by law, and the rule of public policy is in his favor, a case is presented where even a slight degree of negligence may properly be held decisive of the issue; and the application of this principle will in nearly all instances determine the matter in favor of the subsequent purchaser, and confine the notice to what appears on the records. This rule was quite recently applied by the Arkansas court in a case that may well serve for an illustration; the statute of that State declaring that filing is notice. A conveyance had been duly filed with the clerk for record, and he by mistake placed it in the box for recorded instruments, and sometime thereafter, supposing that he had recorded it, returned it to the owner who took it away without noticing the mistake; and it was held that the loss resulting therefrom should fall on the owner rather than on a subsequent purchaser of the property. The owner could easily have seen, says the court, that there was no certificate of record attached to his deed; and as between two innocent parties the one whose negligence made the loss possible should bear it, and should be held estopped to set up his prior right against the party without fault. The doctrine of constructive notice by registration rests upon the idea that all persons may learn and actually know that of which the law gives notice and implies knowledge and it would contravene every principle of right and fair dealing to permit one to insist upon this constructive notice and claim the benefit of this implied knowledge when his act had made such knowledge unattainable.[26]

If the grantee in receiving back his deed cannot rely on the principle that he has done his full duty in filing it for record, and on the presumption that the officer has done his duty in the premises; but must unfold the deed and examine it for a certificate of record, neither can he rely on the certificate, if it be there, for this shows only that the deed has probably been recorded, but not that it has been properly recorded or duly indexed.[27] The probability of mistake in returning a deed without its having been recorded at all, is much less than that of mistake in copying it on the record, and the negligence in failing to examine for mistake will be greater in the latter case than in the former. The logical result of this rule is that whenever the grantee removes his deed from the recording office, or has the notice given by his filing merged into that of the record, without seeing that the recording is actually and correctly done, he will be held to stand by the record, and to abide the consequences of error therein. It is apparent from these later decisions that even where the statute declares the filing to be notice, the grantee cannot, as against the spirit and intent of the recording law, and the equity of the matter, rely upon the narrow and literal construction of the terms of the statute in his favor; and that eventually the doctrine will become universal that the record imparts notice only of what it contains. The application of the equity principles pertaining to negligence can alone furnish a satisfactory solution of the matter, and one by virtue of which conflicting cases by the same courts can be harmonized with each other.[28] In applying these principles to a case where a deed was filed and lost before its record, it was declared by Mr. Justice Brewer that, in order to bring it within the statutory provision that filing is notice, it must be satisfactorily

Iowa, 14; State v. Davis, 96 Ind. 539, and cases in note 3 to this article.

24 Laws 1877, p. 312, § 4; Rev. Code, 1881, § 2314.

25 Ritchie v. Griffiths (Wash.), 25 Pac. Rep. 341, Judge Dunbar delivering the opinion.

26 Turman v. Bell (Ark.), 15 S. W. Rep. 886. It is admitted by the court that Oats v. Wall, 28 Ark. 244, unless limited, would support a contrary decision of this case, and it is therefore limited to the precise state of facts then at issue. In Chandler v. Scott (Ind.), 26 N. E. Rep. 797, where a chattel mortgage was withdrawn under facts similar to those in Turman v. Bell, the filing was held to continue effectual.

27 Such certificate does not release the grantee from the responsibility of seeing that the deed is in fact properly recorded. Ritchie v. Griffiths, *supra*.

28 For example, the case of Throckmorton v. Price, 28 Tex. 605, 91 Am. Dec. 334, is a strong one in favor of filing as full notice, and that of Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304, squarely supports the other view. The latter case does not refer to the former one, although the same able judge rendered both opinions; but it does appear in the first case that the prior deed still remained in the office, though unrecorded from oversight, at the time the subsequent purchaser bought.

shown that the omission to record and loss of the instrument was solely the fault of the recorder; and also that the defendant (grantee) after being aware of the defect in the record was not guilty of *laches* in failing to give notice of his title, either by occupation of the premises, the record of a new deed, or proceedings in court. Every claimant of title owes to the public the duty of giving notice of it, and where the notice fails, and he is aware of the failure, it devolves upon him to make good the omission, and failing in this duty, he will be estopped.[29] The doctrine thus announced, when correctly applied to the facts of other cases will, with but few exceptions, decide the question, and also establish the rule, in favor of the record as notice only of what it actually contains. B. R. WEBB.

Baird, Texas.

[29] Lee v. Birmingham, 30 Kan. 312, 1 Pac. Rep. 73.

COUNTY—DEFECTIVE HIGHWAY—CONSTITUTIONAL LAW.

TEMPLETON V. LINN COUNTY.

Supreme Court of Oregon, April 30, 1892.

A statute making counties liable for injuries "arising from some act or omission of such county," *e. g.*, a defect in a highway, a liability which did not exist at common law does not create a vested right in the person injured, and the repeal of such a statute does not infringe the provision of the Oregon constitution (art. 1, § 10), that "every man shall have a remedy by due course of law for injury done him in person, property or reputation."

STRAHAN, C. J.: The proposition that at common law a county was not liable for an injury resulting from a defect in one of its highways or roads is established by an array of authorities which cannot be questioned. White v. Commissioners, 90 N. C. 437; Dosdall v. County of Olmsted, 30 Minn. 96, 14 N. W. Rep. 458; Wood v. Tipton Co., 7 Baxt. 112; Brabham v. Supervisors, 54 Miss. 363; White v. County of Bond, 58 Ill. 297; Downing v. Mason Co., 87 Ky. 208, 8 S. W. Rep. 264; Reardon v. St. Louis Co., 36 Mo. 555; Swineford v. Franklin Co., 73 Mo. 279; Clark v. Adair, 79 Mo. 536; Granger v. Pulaski Co., 26 Ark. 37; Barnett v. Contra Costa Co., 67 Cal. 78, 7 Pac. Rep. 177; Scales v. Chattahoochee Co., 41 Ga. 225; Hedges v. Madison Co., 1 Gilman, 567; Marion Co. v. Riggs, 24 Kan. 255; Watkins v. County Court, 30 W. Va. 657, 5 S. E. Rep. 654; Manuel v. Commissioners, 98 N. C. 9, 3 S. E. Rep. 829; Fry v. County of Albemarle, 86 Va. 195, 9 S. E. Rep. 1004; Gilman v. Contra Costa Co., 68 Amer. Dec. 295; Woods v. Colfax Co., 10 Neb. 552, 7 N. W. Rep. 269; Monroe Co., v. Flint (Ga.), 6 S. E. Rep. 173; Hamilton Co., v. Mighels, 7 Ohio St. 109; Freeholders v. Strader, 18 N. J. Law, 108; Cooley v. Freeholders, 27 N. J. Law, 415; Pray v. Jersey City, 32 N. J. Law, 394; Young v. Commissioners, 2 Nott & McC. 537; Ensign v. Supervisors, 25 Hun, 20; Bartlett v. Crozier, 8 Amer. Dec. 428; Cooley, Const. Lim. (3d Ed.) 247; *Id.* (6th Ed.) 301; Dill. Mun. Corp. §§ 996, 997, 999; Barbour Co., v. Horn, 48 Ala. 566; Covington Co. v. Kinney, 45 Ala. 176; Rankin v. Buckman, 9 Or. 256; Sheridan v. Salem, 14 Oreg. 328, 12 Pac. Rep. 925; Ford v. Umatilla Co., 15 Oreg. 318, 16 Pac. Rep. 33; Grant Co. v. Lake Co., 17 Oreg. 459, 21 Pac. Rep. 447; Treadwell v. Hancock Co., 11 Ohio St. 190; Morey v. Newfane, 8 Barb. 645; Lorillard v. Monroe, 11 N. Y. 392; Smith v. Board, 46 Fed. Rep. 340; Barnes v. Columbia, 91 U. S. 552; Conrad v. Ithaca, 16 N. Y. 158. Nor did the appellant seek to controvert this proposition upon the trial in this court. Her only contention is that, at and before the adoption of the constitution of this State, there was a statute in force in the then territory, enacted by the territorial legislature, creating a liability against any county where an injury might happen to any person through a defective road or bridge, where such road or bridge was under the control of the county court or board of county commissioners of such county; and that by section 10, art. 1, of the constitution, the legislature of the State was disabled from repealing said territorial statute without enacting another, which would be a substantial equivalent for the law as it then stood on that subject. The provision of the constitution relied upon is as follows: "No court shall be secret, but justice shall be administered openly and without purchase, completely and without delay, and every man shall have a remedy by due course of law, for injury done him in person, property, or reputation." Section 347 of the Code, as originally enacted, is not materially variant from the law as it stood prior to the adoption of the constitution, and is as follows: "An action may be maintained against a county or other of the public corporations mentioned or described in section 346, either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation." In 1887 this section was amended by omitting the words "or for an injury to the rights of the plaintiff, arising from some act or omission of such county or other public corporation," and by the addition of the words, "and not otherwise," after the word "authority," in said section. The liability created against a county by this statute, as it existed prior to the amendment in 1887, was recognized and enforced in McCalla v. Multnomah Co., 3 Oreg. 424, and the rule there stated continued to be recognized until the amendment. This is the first case arising under the statute as amended that has reached this court. There being no common law liability, unless the statute has created a liability there is none; and, the statute having been repealed, there is none under the statute, if it were competent for the legislature to repeal it. It must be conceded that the right to repeal existed, unless the legislature was prohibited or restrained from

repealing it by article 1, § 10, of the constitution.

The words, "and every man shall have a remedy by due course of law for injury done him in person, property, or reputation," are claimed to operate as a guaranty in favor of all persons who might be injured by a county's neglect; that the legislature should never so change the statute as to destroy the liability of such county. In other words, the constitution found a certain liability created by statute resting upon the several counties, and tied the hands of the legislature, so that such liability should endure as long as the constitution shall remain in force. As a proposition of constitutional law, this contention seems startling, and, although the constitutions of many of the States of this Union contain substantially the same provision of section 10, *supra*, no judicial authority was cited upon the argument in support of it and I think it may be safely assumed that none exists. The repeal of the statute creating the liability of a county for negligence is not the only way that liability might be destroyed. It is within the power of the legislature to repeal the act creating a county, and with such repeal a liability would be as effectually canceled and destroyed as if the county had never existed. Says the Supreme Court of the United States in Laramie Co. v. Albany Co., 92 U. S. 307: "Corporations of this kind are properly denominated 'public corporations,' for the reason they are parts of the machinery employed in carrying on the affairs of the State; and it is well-settled law that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public welfare may demand." And the plenary power of the legislature over such corporations was fully recognized by this court in Morrow Co. v. Hendryx, 14 Oreg. 397. 12 Pac. Rep. 806. But it was argued upon the trial that the act making counties liable for the neglect of those who may be intrusted with the administration of their affairs for the time being was in the nature of a remedy, and for that reason it was placed beyond the power of the legislature to repeal it. A remedy for what? If this statute creates a remedy, where is the law that creates the liability? We have seen that it is not the common law, and there was no statute on the subject. So that, to maintain the doctrine claimed by the appellant, it would have to be held that this statute performed the double office of creating the liability against the county, and also of furnishing a remedy whereby the liability may be enforced, and then by the same words of the act. A process of reasoning which leads to such consequences must be fallacious. In this case the statute making the county liable was repealed before the alleged injury. At the time of the repeal the plaintiff had no cause of action against Linn county, and her sole cause of complaint is that the repeal of the statute before the injury cut off a cause of action which she otherwise would have had against the county. If the plaintiff's rights had accrued before the repeal of the statute, there would have been more reason for her contention, but it would not have been well founded in that case; but, when the repeal of the statute did not in any manner affect her at the time, it is difficult to see how her misfortunes, happening after its repeal, can furnish her any grounds of complaint. In legal sense, there can be no liability for negligence where the defendant owed the plaintiff no duty, and, inasmuch as the duty which a county owed was created by statute only, its repeal destroyed the only foundation upon which an action for negligence could rest. But it was insisted upon the argument that section 10, *supra*, was in the nature of a guaranty to the citizens of the State that some rights were secured to them which were placed beyond the power of legislation, and that it was the duty of the court to define those rights. The time allowed for the consideration of this subject is too brief to allow an exhaustive examination of it; besides, it is never safe for a court to undertake to decide any more than the exact question before it. In addition to this, on the principle of "inclusion and exclusion," the court will be better able to determine the effect of this provision of the constitution in each particular case as it shall arise. But I think it may be safely said that, without the existence of a right, a party is entitled to no remedy, and the constitution does not purport to guaranty any. But the rights of a party may be violated, and for such violation such party must have a remedy. What are those rights? Vested rights undoubtedly. Says Judge Cooley: "But a vested right of action is 'property' in the same sense in which tangible things are property, and is equally protected against arbitrary interference. When it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away, and every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice, or to submit to conditions not imposed upon his fellows, as a means of obtaining it."

Vested rights are placed under constitutional protection, and cannot be destroyed by legislation. Not so with those expectancies and possibilities in which the party has no present interest. Take the statutes of descents by way of illustration. A man's heirs have no vested interest in that statute, though, if left unrepealed until his death, they would inherit his property; but the legislature might interfere in the meantime, and repeal the law altogether, or by a new act change the course of descent, and they could have no cause of complaint. Under a constitutional provision in all respects similar to our own, it was held that there is no vested right in the law generally, nor in legal remedies, and it is competent for the legislature to make changes in these so long as they do not affect the obligation of contracts. Edwards v. Johnson, 105 Ind. 594, 5 N. E. Rep. 716; Bryson v. McCreary, 102 Ind. 1, 1 N. E. Rep. 55. And in Bank v. Freeze, 18 Me.

109, it was held that the legislature has power to take away by statute what is given by statute, except vested rights. So in Fire Department v. Ogden, 59 How. Pr. 21, it was held that, where a penalty has been imposed by law, the legislature has power to repeal it entirely, or to limit the causes in which it is recoverable, even though an action has been brought for its recovery. And in Welch v. Wadsworth, 30 Conn. 149, it was held that, by the repeal of the penal statute, all penalties fall, even if given to individuals, and suit has been brought and is pending for them. So, also, in Bank of St. Mary's v. State, 12 Ga. 475, it was held that an informer, who commences a *qui tam* action under a penal statute, does not acquire thereby a vested right to the forfeiture. His claim to the penalty is inchoate and cannot be fixed except by judgment. And held, further, that no judgment can be rendered on a repealed statute. The repeal prevents the imperfect right from being consummated, and it is competent for the legislature to pass such repealing statute at any time before final judgment, and it matters not whether the whole penalty, when recovered, is given to the public or to the prosecutor, or it is divided between them. The same doctrine is announced in Parmelee v. Lawrence, 44 Ill. 405; Henschall v. Schmidtz, 50 Mo. 454; Chaffe v. Aaron, 62 Miss. 29; County of Menard v. Kincaid, 71 Ill. 587; Musgrove v. Railroad Co., 50 Miss. 677. It must not be overlooked that courts never declare an act of the legislature unconstitutional unless the conflict is manifest and free from all reasonable doubt. This alone ought to be sufficient to save the act of 1887 from that fate. I regret that a want of time prevents a fuller and more careful review of this most important and interesting subject, but enough has been said to indicate the main reasons on which this opinion is based; that is all that is possible at present. I think the judgment appealed from should be affirmed.

NOTE.—The rule that there is no vested right in any particular remedy is general. Cooley Const. Lim. 442. It has been so held of laws changing the rules of evidence (Rich v. Flanders, 39 N. H. 304; Fales v. Wadsworth, 23 Me. 553); or the rules regulating the process of attachment (Bigelow v. Pritchard, 21 Pick. 169); or taking away the privilege of appeal (Leavenworth Coal Co. v. Barber, 27 Pac. Rep. 114; People v. Richmond, 26 Pac. Rep. 929); or changing the mode of collecting taxes (Hosmer v. People, 96 Ill. 58); or the mere forms of procedure (Lockett v. Usry, 28 Ga. 345); abolishing imprisonment of debtors (Sturgis v. Crowninshield, 4 Wheat. 122, 200); or changing the period of limitations (Grigsby v. Peak, 57 Tex. 142; De Cordova v. Galveston, 4 Tex. 470). Though of course the State has no power to divest rights which have once been perfected and vested by limitation. Grigsby v. Peak, 57 Tex. 142.

Laws changing the exemption of personalty from seizure for debt have been sustained as affecting the remedy merely. Bronson v. Kinzie, 1 How. 311; Morse v. Goold, 11 N. Y. 281; Sprecker v. Wakely, 11 Wis. 432; Maul v. Vaughn, 45 Ala. 324; Martin v. Hughes, 67 N. C. 293; Hardeman v. Downer, 39 Ga. 425; Coleman v. Ballandi, 22 Minn. 144; Cusic v. Douglas, 3 Kan. 123; Breitung v. Lindauer, 37 Mich. 217. But it has been held that homestead exemptions cannot be applied to previously existing contracts, on the ground that while professedly operating on the remedy only, they in reality impair the obligation of the contract. Gunn v. Barry, 15 Wall. 610; Edwards v. Kearzy, 96 U. S. 595; Homestead Cases, 22 Gratt. 266; Squire v. Mudgett, 61 N. H. 149; Foster v. Byrne, 76 Iowa, 295; Lessly v. Phipps, 49 Miss. 790; Cochran v. Miller, 74 Ala. 50; Cohn v. Hoffman, 45 Ark. 376; Wright v. Straub, 64 Tex. 64; Harris v. Austell, 2 Baxt. 148; Johnson v. Fletcher, 54 Miss. 628, 28 Am. Rep. 388; Duncan v. Barnett, 11 S. C. 333, 32 Am. Rep. 476; Wilson v. Brown, 58 Ala. 62, 29 Am. Rep. 727.

In Maine a statute (Rev. St. ch. 82, § 116) providing that no party who receives any money or valuable thing as a consideration for a contract made and entered into on Sunday shall be permitted to defend any action on such contract until such consideration has been restored, which by its terms was retroactive, was held valid on the ground that it affects the remedy only and not the obligation of the contract. Berry v. Clary, 77 Me. 482.

The limitation of this power seems to be that the party is not to be left without remedy altogether. "There is, we apprehend, no such thing as a vested right in remedies. All the courts say is, that the legislature cannot so change the remedy as to render it nugatory." Lockett v. Usry, 28 Ga. 345, 350. Compare Wilder v. Lumpkin, 4 Ga. 208. "It has always been held that it is competent for the general assembly to change the remedy if thereby the right is not affected." Hosmer v. People, 96 Ill. 58. "All the authorities agree that it is within the power of the legislature to repeal, amend, change or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy according to the course of justice as it existed at the time the contract was made." Von Baumbach v. Bade, 9 Wis. 559, 577. See also Hasbrouck v. Shipman, 16 Wis. 296; State v. Bennett, 24 Ind. 383; Webb v. Moore, 25 Ind. 4; Cargill v. Power, 1 Mich. 369; Huntzinger v. Brock, 3 Grant's Cas. 243. A law which deprives a party of all legal remedy must necessarily be void as impairing the obligation of his contract. Call v. Hagger, 8 Mass. 430; Osborn v. Nicholson, 13 Wall. 662; State v. Bank, 1 S. C. 63; Thompson v. Commonwealth, 81 Pa. St. 314; Griffin v. Wilcox, 21 Ind. 370; West v. Sansom, 44 Ga. 295; Penrose v. Erie Canal Co., 56 Pa. St. 46; Johnson v. Bond, Hempst. 533; United States v. Conway, Hempst. 533; Oatman v. Bond, 15 Wis. 20.

All these decisions rest upon the provision of the federal constitution against impairing the obligation of contracts. But there is a vast difference between rights arising out of contract, the obligation of which is specifically protected by the constitution, and a right to sue for damages arising from a tort, as contended for in the principal case. Thus in Drehman v. Stifel, 41 Mo. 184, 204, the Supreme Court of Missouri held that a right to recover damages in an action of forcible entry and detainer is not a vested right of property. In that case the defendant pleaded in bar the ordinance of the constitutional convention of March 17, 1865 (Const. art. 11, § 34), providing that no person should be liable to civil suit or criminal proceedings for any act done by virtue of military authority or in pursuance of military orders. The court sustained the validity of the ordinance, saying: "The federal constitution does not prohibit a State from passing retrospective ordinances of a civil nature, which

merely take away a right of action or only divest rights vested by law in an individual, if it does not impair the obligation of a contract nor divest settled rights of property." "So far as the ordinance operates retroactively upon the plaintiff's case, it may be said to deprive him of his right to recover, but it does not take away or infringe any vested rights of property." This decision was sustained on writ of error to the Supreme Court of the United States. 8 Wall. 595. See also Hess v. Johnson, 3 W. Va. 645.

Nor does it make any difference that the right of action for tort has been already reduced to a judgment. A very striking case in this connection is the decision of the Supreme Court of the United States in Louisiana v. New Orleans, 109 U. S. 285. The question was as to the validity of a legislative limitation upon the power of the city to impose taxes to such an extent as to make it impossible to pay a judgment recovered against it for injuries done by a mob. Said Mr. Justice Field, in delivering the opinion: "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon a contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure. Municipal corporations are instrumentalities of the State for the convenient administration of the government within their limits. They are invested with authority to establish a police to guard against disturbances; and it is their duty to exercise their authority so as to prevent violence from any cause, and particularly from mobs and riotous assemblages. It has therefore been generally considered as a just burden cast upon them to require them to make good any loss sustained from acts of such assemblages which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation, within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. But, however considered, the imposition is simply a measure of legislative policy in no respect resting upon contract, and subject like all other measures of policy to any change the legislature may see fit to make, either in the extent of the liability or in the means of its enforcement. And its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by judgments rendered."

In the very recent case of Freeland v. Williams, 131 U. S. 405, the same court (opinion by Mr. Justice Miller) held the constitution (art. 8, § 35) of West Virginia, protecting the property of citizens of that State from sale under judgments for damages for any act done according to the usages of civilized warfare in prosecution of "the war of the rebellion" valid, even when applied to a judgment, previously obtained, founded on a tort committed as an act of public war. The court cite with approval Louisiana v. New Orleans, *supra*. See also Pierce v. Kitzmiller, 19 W. Va. 564, where a similar conclusion was reached as to the validity of the same constitutional provision in an action to enforce a judgment for a tort. And in McAfee v. Covington, 71 Ga. 272, and Parker v. Savage, 6 Lea (74 Tenn.), 406, it was held that although a homestead exemption was invalid as impairing the obligation of a pre-existing contract, it would be held valid as against a previously rendered judgment for a tort.

CORRESPONDENCE.

LENGTHY JUDICIAL CAREERS.

To the Editor of the Central Law Journal:

In your reference to Lord Bramwell (Vol. 34, p. 485), you speak of his judicial career, etc., of thirty-six years, which brings to my mind a case which I believe has no parallel, at least in modern times. Brenton Halliburton was appointed to the Bench of the Supreme Court of Nova Scotia, now a part of Canada, January 10, 1807, and retained the seat till his death in July, 1860—fifty-three and a half years. On the 31st of January, 1833, he was made chief justice of the same court, and was knighted late in life. He was not at all related to Thomas C. Haliburton (Sam Slick), who sat on the same bench from 1st April, 1841, to August, 1856. Sir Brenton had two l's in his name; Thomas C. had only one. I think you will not find any other case of a judge sitting the same length of time as Sir Brenton in an English-speaking country.

H. H. BLIGH,
Librarian.

BOOK REVIEWS.

AMERICAN STATE REPORTS, Vol. 23.

We find in this volume the Florida case of City of Jacksonville v. Ledwith, followed by a very interesting discussion of the authorities on the subject of the principal case, namely, the power of municipalities to establish and regulate markets. Commonwealth v. Manchester (Mass.), followed by a note, brings up in an interesting way the subject of the fisheries and the jurisdiction of the States in connection therewith. Gulf, Colorado & Santa Fe R. Co. v. Brentwood (Texas), holding that the promise of the master to repair defective machinery does not relieve the servant from the result of his contributory negligence, is also well annotated. There is an exhaustive note to the case of Morrill v. Morrill (Oreg.), on the subject of collateral attack and the conclusiveness of a judgment.

BOOKS RECEIVED.

A Treatise on Federal Practice in Civil Causes with special reference to Patent Cases and the foreclosure of Railway Mortgages. By Roger Foster, of the New York Bar, Author of "Foster's Federal Judiciary Acts" and "Trial by Newspaper," and Lecturer on Federal Jurisprudence at the Law School of Yale University. In two volumes. Boston: The Boston Book Company. 1892.

QUERIES ANSWERED.

ANSWER TO QUERY NO. 12.

[*To be found in 34 Cent. L. J. p. 477.*]

Section 1646, Rev. Stats., provides for an appeal by the defendant. This seems to clearly exclude the right of appeal by the city in cases arising under the ordinances. Judge Ellison, of the 27th Judicial Circuit, has so ruled. Among the attorneys there was no question as to the correctness of his ruling.

E. H.

HUMORS OF THE LAW.

THE REASON WHY.—Smart Lawyer (who appears for the prisoners) to Witness—"You say that on the

night of the murder the moon was so bright that you could see the burglars in the room. Was your husband awake at the time?"

Witness—"I don't know."

"His face was toward you, wasn't it, or was it not?

"I don't know."

"Eh? You don't know? Was his face turned toward you or toward the wall?

"I don't know."

"Gentlemen of the jury, you hear the witness. She identifies the prisoners as the burglars who were in the room, and yet she cannot tell in what position her husband was lying. Now (to witness), why don't you know?"

"I could not see."

"Ah, ha! I thought so. She could not see. She, who identifies the prisoners, could not see which way her husband's face was turned. Explain that if you can."

"Well, sir, my husband is so bald that in a dim light I can't tell his face from the back of his head."—*London Tit-Bits.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE. — A policy insuring against death, effected through external, violent, or accidental means, but excepting all cases in which there should be no visible sign of bodily injury, or in which death should occur in consequence of disease, or in which the injury was not the proximate cause, does not relieve the insurer from liability, where death results from *peritonitis* occasioned by a fall; and this, even though the assured previously had *peritonitis*, and had thus been rendered peculiarly liable to a recurrence.—FREEMAN V. MERCANTILE MUT. ACC. ASS'N., Mass., 30 N. E. Rep. 1013.

2. ADMINISTRATION — Debts of Decedents. — A conditional decree, directing an executor to pay certain debts due by his testator's estate, or due from him in his fiduciary capacity, when he shall have collected certain other specified claims or debts coming to his testator's estate, constitutes no lien upon the real estate of such executor. Neither could execution be issued thereon and enforced against him without further proceedings in the cause wherein such decree has been rendered; nor will a bill in chancery be maintained to enforce the lien of such decree against the real estate of such executor.—GAY V. SKEEN, W. Va., 15 S. E. Rep. 64.

3. ADMINISTRATION—Limitations.— The remarriage of an executrix, more than a year after taking out letters testamentary, but before the bar of the statute had attached to a debt in respect to which it had commenced to run in the life-time of her testator, does not *ipso facto* cause her authority to cease.— MCMILLAN V. HAWARD, Cal., 29 Pac. Rep. 774.

4. ADMINISTRATION — Substitution. — A substitution prohibited by our law is the disposition of a donation *inter vivos* or *mortis causa*, which vests the property of the testator in a person named, during the life-time of such person, who has not the power of alienation; and at his death the same property is to vest in another person named, but who takes title directly from the testator, but by a title which only springs into existence on the death of the first donee.—SUCCESSION OF GLIDDEN, La., 10 South. Rep. 877.

5. ADMIRALTY—Charter-party. — Unqualified charter-parties are to be construed liberally as mercantile contracts, and a party who has by charter charged himself with an obligation must make it good, unless prevented by the act of God, the law, or the other party to the charter. — THE B. F. BRUCE, U. S. C. C. (Ohio), 50 Fed. Rep. 118.

6. ADVERSE POSSESSION.—An agent, whom the principal had given money with which to buy land, took the deed in his own name, and gave a mortgage on the premises to secure notes for a balance of the price. The principal entered into possession, and subsequently took a deed from the agent. He claimed that he did not know until two or three weeks after he went into possession that the agent had taken title in himself. Both principal and agent at times paid taxes and interest: Held, that the possession of the principal and of others who held the land, either with the agent's consent or as his grantees, was not adverse to the mortgagee.—WATTS V. CREIGHTON, Iowa, 52 N. W. Rep. 12.

7. ADVERSE POSSESSION. — A person who has actual possession of a part of a tract of land described in his deed has constructive possession of the whole.—PORTER V. MILLER, Tex., 19 S. W. Rep. 467.

8. ADVERSE POSSESSION BY CO-TENANT.—The possession of a tenant in common is not adverse to that of his co-tenant, where there is no ouster, or act equivalent thereto.—SIBLEY V. ALBA, Ala., 10 South. Rep. 831.

9. APPEAL FROM JUSTICE'S COURT.—The constitutional provision that the superior courts "shall have appellate jurisdiction in such cases arising in justices' and other inferior courts, in their respective counties, as may be prescribed by law," limits the exercise of their jurisdiction to the extent and mode which the legislature may prescribe. — SHERER V. SUPERIOR COURT OF LASSEN COUNTY, Cal., 29 Pac. Rep. 716.

10. ARBITRATION AND AWARD. — An arbitration and award are none the less binding because made pursuant to the regulations of a church to which the parties belong.—PAYNE V. CRAWFORD, Ala., 10 South. Rep. 911.

11. ATTACHMENT— Trespass. — The owner of goods wrongfully attached cannot maintain trespass therefor, where, at the time they were attached, they were not in his actual possession, but were in the possession of the sheriff, under prior attachments by other of his creditors.—JOSEPH V. HENDERSON, Ala., 10 South. Rep. 843.

12. BANKS — Collections. — Where a bank, the holder for collection of a promissory note, by its negligence

discharges an indorser, the latter is not estopped to set up his discharge, though the bank had at the time on deposit funds of the makers, which it afterwards paid out on the faith of an extension of time granted to the makers by the indorser, if, at the time the extension is granted, the indorser was ignorant of his discharge, and that the bank had indemnity within its control. — CITY NAT. BANK OF DAYTON V. CLINTON COUNTY NAT. BANK OF WILMINGTON, Ohio, 30 N.E. Rep. 968.

13. CARRIERS — Demurrer to Evidence.—Where, in an action against a carrier for delivering property to a person other than the consignee, the evidence tends to show that plaintiff owned the property; that the carrier, without authority, delivered it to a person other than the consignee; and that such person converted it to his own use and was insolvent,—a demurrer to the evidence should be overruled, since such demurrer concedes the truth of all the facts favorable to plaintiff which the evidence tends to prove.— HARTMAN V. CINCINNATI, I., ST. L. & C. RY. CO., Ind., 30 N. E. Rep. 930.

14. CARRIERS — Limiting Liability. — A contract by a carrier, limiting its liability for damage occasioned by its negligence, is governed by the *lex loci contractus*.— FAIRCHILD V. PHILADELPHIA, W. & B. R. CO., Pa., 24 Atl. Rep. 79.

15. CARRIERS—Passengers.—A passenger on a railway train, who refuses to accede to a wrongful demand for fare, is entitled to be carried on acceding to the demand, though the train may have been stopped with a view to his expulsion; but if the demand upon him is rightful he cannot avoid expulsion by tendering the fare while the train is being stopped, or after the stoppage.—GEORGIA S. & F. R. CO. V. ASMORE, Ga., 15 S. E. Rep. 13.

16. CARRIERS — Passengers. — When a railroad company sells a ticket to a flag station at which its trains do not stop unless signaled to do so for the purpose of receiving passengers, or when there are on board passengers bound for such station, it is ordinarily the duty of the conductor, before reaching the station, to ascertain from the passenger holding such ticket his destination, and to stop the train there for the purpose of allowing the passenger to leave the train.—CHATTANOOGA R. & C. R. CO. V. LYON, Ga., 15 S. E. Rep. 24.

17. CARRIERS — Passengers — Dangerous Premises. — Defendant's railroad train, on which plaintiff was a passenger, stopped at a coal chute some distance from the station, and the conductor informed plaintiff that he would have to get off there, as the train would not stop at the station. It being dark, in getting away from the train plaintiff fell over some timber, and was injured: Held, that defendant was liable, as it was bound to furnish a safe and convenient egress.—BURNHAM V. WABASH W. RY. CO., Mich., 52 N. W. Rep. 14.

18. CARRIERS—Passengers — Instructions.— The court properly charged that "the railroad company was required to use the utmost practicable care in providing for the safety of passengers on its road, and to use that high degree of prudence, diligence, and care in building its road and in maintaining its track and in running its trains as would be used by very cautious, prudent, and competent persons under similar circumstances, and, if it failed to use such degree of care, such failure was negligence." — LEVY V. CAMPBELL, Tex., 19 S. W. Rep. 438.

19. CARRIERS OF GOODS — Limitation of Liability. — Rev. St. art. 278, which prohibits common carriers within the State from limiting their liability at common law, does not prevent a railroad company, a part of whose line is operated in this State and a part in other States, from limiting its liability by contract for carrying cotton into another State.— MISSOURI PAC. RY. CO. V. INTERNATIONAL MARINE INS. CO., Tex., 19 S. W. Rep. 459.

20. CARRIERS OF GOODS—Limiting Liability.—Rev. St. art. 278, provides that common carriers, entirely within the body of the State, shall not limit their common-law liability by exceptions in the bill of lading or in any manner whatever, and no special agreement made in contravention of the provisions of the article shall be valid: Held, that such statute does not apply to an interstate or foreign shipment, but only to shipments beginning and ending within the State.—MISSOURI PAC. RY CO. V. SHERWOOD, Tex., 19 S. W. Rep. 455.

21. CERTIORARI—Review.—Where a case is brought up on *certiorari*, the court will not look outside of the record for the facts, even though they be set forth in the opinion of the court.— IN RE HAMILTON STREET, Pa., 24 Atl. Rep. 12 2.

22. CONTRACT—Construction.—Plaintiff procured purchasers for certain heaters sold by defendant under a written agreement "to divide equally the expense of making the heater and the profits on the same." The heaters were not made by the defendant, but were bought by him from the manufacturer: Held, in an action by plaintiff to recover his share of the profits, that he was chargeable with half the cost of the heaters.— HALBERSTADT V. BANNAN, Pa., 24 Atl. Rep. 84.

23. CONVERSION OF REAL ESTATE.— Where a deed of trust empowers the trustee, with the consent of the life tenant, to sell the land, and to invest the proceeds in trust for the same uses and purposes, limited and declared as to the land, and the trustee, with the life tenant's consent, sells the land, and invests the proceeds in mortgages, there is an actual conversion of the real estate.—IN RE SCHETKY'S ESTATE, Pa., 24 Atl. Rep. 78.

24. CORPORATIONS — Fraudulent Conveyance. — A transfer by a corporation of all its property to another corporation, pending an action against which afterwards results in a judgment against it, is void as against such plaintiff.—COLE V. MERCANTILE TRUST CO., N. Y., 30 N. E. Rep. 847.

25. CORPORATION — Insolvency.—Where one sues a corporation on a contract or other obligation, he has the right to have such corporation retained as defendant, and cannot be deprived of such right by its insolvency, or by any disposition it may make of its property, and on appeal in such action a motion to substitute an assignee of the corporation as defendant will be denied. —HOOD V. CALIFORNIA WINE CO., Wash., 29 Pac. Rep. 768.

26. CORPORATIONS — Receivers — Accounting.—Where suit is brought by one of the stockholders of a corporation for the appointment of a receiver and for an accounting, general assertions of conspiracy, fraud, mismanagement, and incompetency are insufficient for such purpose, but the specific facts relied on in proof of such matters should be pointed out.—ROBINSON V. DOLORES NO. 2 LAND & CANAL CO., Colo., 29 Pac. Rep. 750.

27. CORPORATIONS—Stock.—A subscription for stock in a corporation, though payable in property at a fictitious valuation, and not enforceable against the subscriber of the corporation in its own interest, because in violation of Const. art. 14, § 6, and Code, § 1662, prohibiting the issue of stock except for money or property at a reasonable value, is not void as against a creditor of the corporation, and cannot be set up as a defense by the subscriber in garnishment proceedings by such creditor.—JOSEPH V. DAVIS, Ala., 10 South. Rep. 830.

28. COUNTER-CLAIM — Independent Transactions. — Where a seller of goods on credit causes the arrest of the buyer for inducing the sale by deceit, and the buyer, after discharge, sues for malicious prosecution, a claim by the seller for damages for the deceit is not a valid counter-claim, since it does not arise out of the same transaction, and is not connected with the subject-matter of the action, as required by Code Civil Proc. § 501.—ROTHSCHILD V. WHITMAN, N. Y., 30 N. E. Rep. 858.

29. COUNTIES—Bonds.—While counties generally have no power to issue negotiable securities unless specially authorized by law, this is a question of State policy, and should be governed by the decisions of the State courts.—FRANCIS V. HOWARD COUNTY, U. S. C. C. (Tex.), 50 Fed. Rep. 44.

30. COUNTIES—Negligence of Agents.—In the absence of special statutory provisions, a county is not liable to a laborer for personal injuries sustained by the negligence of the county's officer under whom work was being performed.—SMITH V. BOARD OF COM'RS OF ALLEN COUNTY, Ind., 30 N. E. Rep. 949.

31. CRIMINAL EVIDENCE—Dying Declarations.—On a trial for murder, the dying declarations of decedent to his attending physician were not admissible, when the only evidence that they were made under a sense of impending death was that the physician had told him that he was going to die, and where he had expressed an intention to "get even" with defendant "when he got up," though at what stage of his illness he had done so did not appear.—YOUNG V. STATE, Ala., 10 South. Rep. 913.

32. CRIMINAL LAW—Character of Accused.—The court having instructed the jury that proof of defendant's good character raised the question whether he was a man who would likely commit the crime charged, and that it would actually outweigh evidence that might otherwise appear conclusive, and, in a doubtful case, turn the scale in defendant's favor, there was no error in a further charge that good character will not avail defendant, if the crime had been satisfactorily proven beyond a reasonable doubt.—PEOPLE V. SWEENY, N. Y., 30 N. E. Rep. 1005.

33. CRIMINAL LAW—False Pretenses.—The receipt or obtaining of property obtained under false pretenses is the consummation of the offense; and when the pretenses are made in one jurisdiction, and the property is obtained by the offender in another jurisdiction, the prosecution can be instituted only in the latter jurisdiction, unless there is a valid statute permitting it elsewhere.—CONNOR V. STATE, Fla., 10 South. Rep. 891.

34. CRIMINAL LAW — Gambling House—License.—Defendant kept a gambling house for some time, and afterwards applied for and received a license to conduct such business, which license was regularly issued, and was antedated so as to cover the period during which the business had been conducted prior to the issuance thereof: Held, that the acceptance of the license fee by the county treasurer and the issuance of the license did not stop the State from prosecuting defendant for keeping a gambling house without a license for the time covered thereby prior to the issue thereof. —STATE V. RAYMOND, Mont., 29 Pac. Rep. 732.

35. CRIMINAL LAW—Homicide—Self-defense.—Where a battery with a weapon likely to produce death was being committed by the deceased upon the slayer when the mortal blow was given, the fact that he provoked the battery by the use of approbrius words would not put the slayer in the wrong for resisting it so far as was necessary to his defense; and a seeming necessity, if acted upon in good faith, would be equivalent to a real necessity.—BOATWRIGHT V. STATE, Ga., 15 S. E. Rep. 21.

36. CRIMINAL PRACTICE — Embezzlement.—Under St. 2d Sess. p. 253, § 92, providing that if any agent, servant, or other person, "who shall have received or been intrusted with any money from or by his master," shall embezzle such money, he shall be punished as if he had feloniously stolen the same, it is sufficient to allege that an agent of B, as such, did "receive and take into his possession a large sum of money of the said B for and in the name and on the account of the said B," and embezzle the same; it not being necessary that the money should have been intrusted to him directly by B.—STATE V. FOURNIER, Mont., 29 Pac. Rep. 824.

37. CRIMINAL PRACTICE — Forgery.—When an indictment for forgery undertakes to set forth the instrument alleged to be forged according to its tenor, great particularity is required, and any variance as to the words of such instrument, unless the same be mere fault of spelling, will be fatal; but, in an indictment for forgery of an order for the payment of money, the words and figures in the margin of the order, and which constitute no part of the instrument, need not be set out, unless they constitute an essential description of the order.—SMITH V. STATE, Fla., 10 South. Rep. 894.

38. CRIMINAL TRIAL—Verdict—Recalling Jury.—Where the jury, in a criminal case, after rendering a defective verdict, which is accepted by the court, are discharged, their functions as jurors cease, and they cannot be recalled, and directed to find a new verdict as they intended; and, if such proceedings are taken, they and the new verdict are a nullity.—PEOPLE V. LEE YUNE CHONG, Cal., 29 Pac. Rep. 776.

39. DAMAGES—Future Profits.—As a general rule the future profits of a contract cannot be included in the injury suffered by its breach, mainly for the reason that they depend upon so many and various contingencies that it is impossible for a court or a jury to arrive at any definite determination of the actual loss by any trustworthy method. They are open to the objection of remoteness as well as of uncertainty.—SCHLIEDER V. DIELMAN, La., 10 South. Rep. 984.

40. DEED — Acknowledgment.—Where the certificate of acknowledgment of an instrument identifies the party known to the officer to be the person who executed the same, a variance in spelling the name of such party as appearing in the certificate will be presumed to be a clerical error merely, and will not vitiate the acknowledgment.—RODES V. ST. ANTHONY & DAK. ELEVATOR CO., Minn., 52 N. W. Rep. 27.

41. DEED—Married Woman—Husband and Wife.—A deed to a married woman purported to convey the land to her and "her heirs and assigns, to her proper use, benefit, and behoof forever, in fee-simple." The deed did not recite that the grantee was married, or describe the land as her separate property, or state that it was purchased with her separate means: Held, that a purchaser of the land from the husband, believing it to be community property, took good title; the deed not being notice that the land was purchased with the wife's separate means.—STILES V. JAPHET, Tex., 19 S. W. Rep. 450.

42. DEPOSITIONS — Suppression. — Where plaintiff's, before the issuing of a commission to take a deposition and without defendant's knowledge, procure a private deposition of the witness, and at the examination under the commission the answers in the private deposition are adopted by the witness, and made the answers to the interrogatories submitted, the deposition should be suppressed.—GREENING V. KEEL, Tex., 19 S. W. Rep. 435.

43. DESCENT AND DISTRIBUTION—Estoppel.—An act of sale, executed, by the testator to his sister, of his undivided interest and share in the succession and property of his deceased mother, will operate as an estoppel against a claim made by his child to an interest in the estate and property of the grandmother, through the father and testator, as an heir.—CALHOUN V. PIERSON, La., 10 South. Rep. 880.

44. DETINUE—Pleading.—In an action of detinue, it is necessary for the plaintiff to aver and prove that he has title to the property, with present right of possession in himself; and, secondly, actual possession thereof by the defendant anterior to the bringing of the suit. In his defense the defendant may prove a want of sufficient title to the property in the plaintiff, or he may prove a want of possession in himself. If the plaintiff shall have proved an anterior possession in the defendant, the burden is shifted, and it devolves upon the latter to prove that he has been legally dispossessed.—BURNS V. MORRISON, W. Va., 15 S. E. Rep. 62.

45. DIVORCE — Contempt — Alimony.—A decree for divorce pursuant to Civil Code, § 139, for the offense of the husband, awarding alimony, is not void, although the period within which it was to be paid was not specified, it being payable until plaintiff's death or the modification of the decree, and a failure to pay the alimony is punishable as for contempt.—EX PARTE HART, Cal., 29 Pac. Rep. 774.

46. DIVORCE BY ACT OF LEGISLATURE.— Under Const. art. 4, § 25, which provides, *inter alia*, that the operation of any general law shall not be suspended by the gen-

eral assembly for the benefit of any individual, a special act of the legislature, granting a divorce, is unconstitutional and void.—JONES v. JONES, Ala., 11 South. Rep. 11.

47. EJECTMENT—Conveyance of Land.—The heirs of a person who has conveyed land to another, which at the time is in the adverse possession of a third person, and the title to which, therefore, does not pass as against such person, cannot, by a subsequent release or conveyance to the adverse holder, defeat ejectment by the grantee in the name of his grantor.—PEARSON v. KING, Ala., 10 South. Rep. 919.

48. EMINENT DOMAIN—Evidence.—In an action against a railroad company for damages to plaintiff's property by the construction and operation of the road, evidence of an offer made to plaintiff for his property is inadmissible to prove its value.—HINE v. MANHATTAN R. CO., N. Y., 30 N. E. Rep. 985.

49. EVIDENCE — Privileged Communications — Husband and Wife.—Code Civil Proc. Cal. § 1881, prohibiting the examination of a husband or wife, during or after marriage, as to communications between them during marriage, does not extend its protection to letters from one to the other found in the possession of the wife's administrator after both are dead.—LLOYD v. PENNIE, U. S. D. C. (Cal.), 50 Fed. Rep. 4.

50. EXECUTION — False Return of Process.—In an action to set aside a judgment by default and a sale under execution thereon as void, on the ground that the defendant therein was not served with process, and had no notice of the action, the truth of the return of the officer, stating that he served the summons on defendant, may be assailed, and defendant is restricted to an action against an officer for false return of process.—JOHNSON v. GREGORY, Wash., 29 Pac. Rep. 831.

51. EXECUTION — Levy. — Certain creditors placed executions in the hands of a sheriff, with instructions not to disturb the debtor's possession of his goods. Subsequently another creditor gave the sheriff an execution, with instructions to levy, which was done. W also delivered to the sheriff an execution with instruction to levy: Held, that W was entitled to priority on his execution as against the creditors that had instructed the sheriff not to disturb the debtor's possession.— WUNSCH v. MCGRAW, Wash., 29 Pac. Rep. 832.

52. FORCIBLE ENTRY AND DETAINER.—Under Acts 1887, p. 85, § 8, which, in authorizing the sale of school lands, provides that any *bona fide* actual settler who may reside on any part of the land at the time the act shall take effect may purchase the same within six months, one who has not purchased the land, or actually resided upon it, cannot maintain an action for forcible entry and detainer, though he has fenced and cultivated a portion. — RICHARDSON v. WESTMORELAND, Tex., 19 S. W. Rep. 482.

53. FRAUD — Proof.— The rule is that he who alleges fraud must prove it, and the supposed exceptions to this rule are more apparent than real. There may be *prima facie* fraud, or fraud may be proved by a number of concurrent circumstances; nevertheless, so long as the scales are evenly balanced, the defendant against whom fraud is alleged must prevail. — GREER v. O'BRIEN, W. Va., 15 S. E. Rep. 74.

54. FRAUDS, STATUTE OF. — A complaint, in an action against a decedent's estate, which counted on a parol contract by which in consideration of care and support by plaintiff during life, decedent agreed to convey a certain amount of land of a specified value, is bad on demurrer; such contract being within Rev. St. 1881, § 4904, requiring all contracts for the sale of land to be in writing.— HERSHMAN v. PASCAL, Ind., 30 N. E. Rep. 932.

55. FRAUDS, STATUTE OF—Boundaries.—A parol agreement between coterminous owners, fixing the boundaries of their lands, followed by possession, is valid and binding.—ARCHER v. HELM, Miss., 11 South. Rep. 3.

56. FRAUDULENT CONVEYANCE. — Where a deed is made for the security of various creditors whose claims are distinct and unmingled with each other, and where part are illegal and fraudulent and another part are fair and untainted with fraud, the security shall not be avoided as to the latter, provided they have given no aid in any way to the concoction of the fraud.— RUFFNER v. WELTON COAL & SALT CO., W. Va., 15 S. E. Rep. 48.

57. GARNISHMENT — Assignment. —An employee may assign his wages for a certain time to come, and his employer, having accepted the assignment, cannot be made liable to another creditor of the employee as garnishee.—DENVER, T. & FT. W. R. CO. v. SMEETON, Colo., 29 Pac. Rep. 815.

58. GARNISHMENT— Wages in Advance.—Under Code, § 3803, which provides that "all property, debts, or effects of the defendant in the possession of the garnishee, or under his control, shall be liable to satisfy the plaintiff's judgment from the service of the notice, or from the time they came to his hands, if acquired subsequent to the service of notice, and before judgment," an employer who is summoned as garnishee for a debt of his employee, at a time when no wages are due, may, from time to time, pay such employee's wages in advance, without incurring any liability to the creditor. — VAN VLEET v. STRATTON, Tenn., 19 S. W. Rep. 428.

59. HIGHWAYS— Alteration.— A highway which, after having been opened and used beyond the memory of any living man, is found not to conform precisely to the original survey, can only be changed by proceedings under the road laws; and until such proceedings are had the abutting owners cannot be compelled to conform to the survey, or to remove improvements not within the highway as theretofore existing.—HANCOCK v. BOROUGH OF WYOMING, Pa., 24 Atl. Rep. 88.

60. HIGHWAYS—Vacation.— On a petition to vacate a county road, where the journal entry of the county court recited facts showing legal notice of the intended application, "and that these facts were made to appear satisfactorily to the court," jurisdiction will be presumed to have been acquired, though the affidavit of posting notices was ambiguous in its statement of facts.—LATIMER v. TILLAMOOK COUNTY, Oreg., 29 Pac. Rep. 734.

61. HOMESTEAD — Rights of Widow.— A widow being entitled to a homestead in fee-simple, exempt from the debts of her deceased husband, contracted subsequent to the purchase thereof, filed a petition for the assignment of homestead, whereupon the probate court, ignoring such petition, ordered the homestead to be sold for the payment of debts: Held, that the sale and conveyance under such order by the administrator were subject to the widow's homestead right; the doctrine of *caveat emptor* applying to the purchaser at such sale.—ANTHONY v. RICE, Mo., 19 S. W. Rep. 423.

62. HUSBAND AND WIFE — Fraudulent Conveyance.— Under the married persons' property act of 1887, which gives a married woman the power of a *feme sole* as to the acquisition and ownership of property used by her in business, a purchase by a married woman from one of her husband's creditors of goods that formerly belonged to the husband, and were bought by the creditor at execution sale, is valid, as against the husband's creditors, where the wife buys the goods for the purpose of engaging in business.— WALTER v. JONES, Pa., 24 Atl. Rep. 119.

63. INJUNCTION — Trespass. — A court of equity has jurisdiction to restrain trespass of a permanent character where the injury complained of is irreparable by an action for damage or ejectment, and the rights of the parties are clear.—MILLER v. LYNCH, Pa., 24 Atl. Rep. 80.

64. INSURANCE — Conditions of Policy.—Where an insurance company's articles of association provide that members shall pay their assessments "within 30 days after receiving notice thereof," before a policy can be declared forfeited for non-payment the company must show that actual notice was had by the member, though a by-law provided that notice of assessments

"shall be given by publication in one or more newspapers." — SCHMIDT V. GERMAN MUT. INS. CO. OF INDIANA, Ind., 30 N. E. Rep. 939.

65. INTOXICATING LIQUOR—Information.—An information charging one with violating the local option law must allege the name of the person to whom the liquor was sold, or, if the name of such person is unknown, must aver that fact. — MARTIN V. STATE, Tex., 19 S. W. Rep. 434.

66. INTOXICATING LIQUORS—Sale.—A complaint charging a druggist, who is licensed to sell liquor under Pub. Sts. ch. 100, § 10, with the unlawful sale of a certain quantity, without having a license to make such sale, is sufficient, without a special allegation setting forth an omission to require from the purchaser the certificate demanded by said section. — COMMONWEALTH V. BANKS, Mass., 30 N. E. Rep. 1014.

67. JUDGMENT—Evidence.—In an action to recover on a judgment rendered in another State, where defendants were not personally served with process in the original suit, and the issue is whether they entered their appearance either personally or by attorney, it is proper to read in evidence a portion of the exemplified record which contains the testimony of one of the defendants, given before a master appointed by the foreign court to take testimony in the original action.—AMERICAN TUBE & IRON CO. V. CRAFTS, Mass., 30 N. E. Rep. 1024.

68. LANDLORD AND TENANT — Action Ex Contractu.—Where land is leased on an agreement that the manure made on the farm shall be used on the land, the lessor may maintain an action *ex contractu* for a breach of the agreement, or he may sue in tort for the conversion of the manure.— BROWN V. MAGORTY, Mass., 30 N. E. Rep. 1021.

69. LANDLORD AND TENANT — Fixtures.—Where the lessor of a factory, under a lease containing a covenant that the lessee shall not make any alteration in the premises without the lessor's consent, refuses to replace an unsafe engine, but offers to allow the lessee to put in a new engine on condition that it shall belong to the lessor, and the lessee, without assenting to such offer, places a new engine on the old foundation, without injury to the premises, and with the intention of removing it upon the expiration of his term, such engine does not become part of the freehold, but remains the property of the lessee.—ANDREWS V. DAY BUTTON CO., N. Y., 30 N. E. Rep. 831.

70. LANDLORD AND TENANT—Holding Over.—If a tenant under a lease for one year holds over after the expiration of his term, the landlord has the legal option to treat him as a trespasser or as a tenant for another year; and, where the landlord signifies his election by a demand of rent, the tenant is bound for another year, and cannot, when he pays the rent, create a different tenancy by accompanying the payment with conditions.—SCOTT V. BEECHER, Mich., 52 N. W. Rep. 20.

71. LANDLORD AND TENANT—Illegal Ejection.—Where a landlord, instead of resorting to the means provided by law, takes upon himself, without authority, to remove the property of his tenant, and to turn him out, he will be liable in damages, though the ejectment was effected without personal violence, in the tenant's absence.—BONIEL V. BLOCK, La , 10 South. Rep. 869.

72. LANDLORD AND TENANT—Rent.—A tenant under a written lease for one year, at a fixed rate, with the privilege of four additional years at the same rate, who at the expiration of one year avails himself of his option and holds onto the land, cannot refuse to pay the rent stipulated in the lease, on the ground that his landlord demanded a higher rent.—JONES V. JAMES, Tex., 19 S. W. Rep. 434.

73. LANDLORD'S LIEN ON CROPS.—Code, § 3056, provides that a landlord has a lien which is paramount to all other liens on the crops grown on rented lands for rent for the current year and for advances: Held, where W was a tenant of plaintiff, and was indebted to him for rent and advances, and defendants knew of such tenancy, that they were charged with constructive notice of such indebtedness, and W's mortgage to defendants on such cotton for additional advances would not give them any right as against plaintiff.—ATKINSON V. JAMES, Ala., 10 South. Rep. 846.

74. LEASE—Distress for Rent.—An agreement by the executor of the deceased owner of a part interest in certain lands and an intending lessee, which simply refers to and ratifies the terms of a previous lease made by the heirs of the deceased to a third party, and specifies certain changes therein, is not a lease, and does not justify a distress for rent by such executor.—GRIER V. MCALARNEY, Penn., 24 Atl. Rep. 119.

75. LIENS OF RAILROAD CONTRACTORS.—The lien given by the Code, § 1979, to "contractors to build railroads," is confined to those contractors employed by the person or company owning the railroad; and the right of lien does not extend to subcontractors who procure the work to be done on their own account in pursuance of a contract between themselves and the primary contractors.—CARTER V. ROME & C. CONST. CO., Ga., 15 S. E. Rep. 36.

76. MALICIOUS PROSECUTION — Probable Cause.—In order that a plaintiff may maintain an action three things must concur: (1) The motive must have been malicious; (2) the suit must have been instituted without any probable cause; (3) the suit must have terminated, after trial of its merits, in favor of the accused.—BRELET V. MULLEN, La., 10 South. Rep. 865.

77. MANDAMUS — Public Records.—Where a county clerk and recorder refused to allow plaintiffs to use the county records for the purpose of making abstracts, *mandamus* was the proper remedy for them to resort to. —STOCKMAN V. BROOKS, Colo., 29 Pac. Rep. 746.

78. MASTER AND SERVANT — Fellow-servant.—A ship carpenter cannot recover for injuries received by falling down a hatchway while working on defendant's vessel, where the hatchway was left uncovered by his fellow-servants.—BARON V. DETROIT & C. STEAM NAV. CO., Mich., 52 N. W. Rep. 22.

79. MASTER AND SERVANT—Fellow-servant.—In Indiana, a baggage-master on a railroad train is considered a coservant with the conductor of another train, through whose negligence a collision occurs.—KERLIN V. CHICAGO, P. & ST. L. R. CO., U. S. C. C. (Ind.), 49 Fed. Rep. 185.

80. MECHANICS' LIENS—Bona Fide Mortgages.—In an action to foreclose a mechanic' slien, that W, the vendor of the land on which the improvements were made, holding a mortgage for the amount of the purchase price, is a "*bona fide* prior mortgagee," within the meaning of the language found in section 5, ch. 200, Gen. Laws 1889, having, as such, precedence over the lien claims of certain mechanics and material-men.—HAUPT LUMBER CO. V. WESTMAN, Minn., 52 N. W. Rep. 33.

81. MECHANICS' LIENS — Notice.—A mechanic's lien notice which merely states that a lien is claimed on certain property "for materials furnished in the construction of buildings thereon," that claimant's demand is a certain amount, that the name of the owner is W, that P is the name of the person to whom such materials were furnished, and that the terms and conditions of the contract under which they were furnished were that payment should be paid in cash, since it does not show what materials were furnished, or the relation between the owner and the person to whom they were furnished, is insufficient to support a lien.—TACOMA LUMBER & MANUF'G CO. V. WILSON, Wash., 29 Pac. Rep. 829.

82. MINING CLAIM—Prospecting Contract.—Where two persons enter into a prospecting agreement, which provides for the joint prosecution of the labor, the agreement includes the continuance of the work until a valid location is made on a legal discovery; and, should one of the prospectors quit work, and the other continue until he finds a vein, the former has no interest in the discovery, unless he has provided therefor by subsequent agreement.—MCLAUGHLIN V. THOMPSON, Colo., 29 Pac. Rep. 816.

83. MORTGAGE—Execution.—A note and mortgage are

properly signed where the mortgagee writes the obligor's name to each instrument, the latter affixes his mark, and a disinterested witness attests the subscriptions.—JOHNSON v. DAVIS, Ala., 10 South. Rep. 911.

84. MORTGAGES.—Rev. St. 1881, § 2931, which provides that every mortgage of lands, not recorded in 45 days from its execution, shall be fraudulent and void as against any subsequent "purchaser, lessee, or mortgagee," does not apply to existing creditors of a mortgagor.—HUTCHINSON v. FIRST NAT. BANK OF MICHIGAN CITY, Ind., 30 N. E. Rep. 952.

85. MORTGAGE—Reservation of Easement.—The owner of a tract of land on which was a milldam mortgaged 41 acres of it without reserving the right to overflow such land. About 2 acres of the 41 were flooded by the dam, though it was not shown that said 2 acres were actually under water when the mortgage was given, or that it was necessary to flood them in order to run the mill successfully: Held, that a purchaser of the 41 acres at foreclosure sale took title free from any easement.—WELLS v. GARBUTT, N. Y., 30 N. E. Rep. 978.

86. MORTGAGE AS ASSIGNMENT FOR BENEFIT OF CREDITORS.—A mortgage and other writings executed at the same time, and all springing out of the same agreement between debtor and creditor, are to be construed together, as one instrument.—KISER v. DANNENBURG, Ga., 15 S. E. Rep. 17.

87. MUNICIPAL CORPORATION—Excavation in Street.—A pedestrian is not confined to a cross walk, but has a right to assume that all parts of the street intended for travel are reasonably safe; and, if he knows of no dangerous excavations or obstructions, he may cross the street at any point that suits his convenience, without being liable to the imputation of negligence.—CITY OF OLATHE v. MIZEE, Kan., 29 Pac. Rep. 754.

88. MUNICIPAL CORPORATIONS—Surface Water.—While the necessary effect of digging a ditch is to throw water from the public street upon the land of a private person, the municipality that digs the ditch is not relieved of liability for damage done by such water by the fact that the ditch was dug upon the land of a third person with that person's consent.—WEIR v. BOROUGH OF PLYMOUTH, Penn., 24 Atl. Rep. 94.

89. MUNICIPAL IMPROVEMENTS—Assessments.—Under Rev. St. arts. 375, 376, which regulate the construction of sidewalks in cities and fix the liability of the owners of the abutting property, assessments for sidewalks, when imposed by a city ordinance, are special taxes, for which the homestead may be sold, as other lands.—BORDAGES v. HIGGINS, Tex., 19 S. W. Rep. 446.

90. NEGLIGENCE — Dangerous Premises.—A person who, without invitation, visits a telegraph office merely for the purpose of paying a friendly call to the operator, which office is owned and occupied by a railroad company for its own purposes and convenience, and which is located on its land and near its track, from which occasional messages are sent and received for outside parties for pay, visits said office as a mere voluntary licensee, subject to the concomitant risks and perils, and no duty is imposed upon the owner or occupant to keep its premises in safe and suitable condition for such visitors, and the owner is only liable for such willful or wanton injury as may be done such licensee by the gross negligence of its agents or employees.—WOOLWINE'S ADM'R v. CHESAPEAKE & O. R. CO., W. Va., 15 S. E. Rep. 81.

91. NEGLIGENCE—Dangerous Premises.—Plaintiff, in leaving offices in the building of defendant, and "carefully reaching to take the stair post and rail, and stepping forward to do so," fell down the stairway and was injured. There was no evidence that the stairway was defectively lighted: Held, that defendant was not liable.—PINNEY v. HALL, Mass., 30 N. E. Rep. 1016.

92. NEGLIGENCE OF LESSOR—Dangerous Premises.—A decayed stairway in the rear of leased premises does not constitute a nuisance, as to the occupant of an adjoining house so as to make the lessor responsible, under his covenant to repair, for an injury sustained by such neighbor while walking on the stairway.—STERGER v. VANSICLEN, N. Y., 30 N. E. Rep. 987.

93. NUISANCE. — An approach to a bridge, which crosses a public street in such a manner as not to interfere with public travel, and which avoids a very dangerous grade crossing at a railroad, is not a nuisance.—COMMONWEALTH v. PITTSTON FERRY BRIDGE CO., Penn., 24 Atl. Rep. 87.

94. PARTITION.—A reversioner or remainder-man cannot compel partition during the continuance of the particular estate.—MERRITT v. HUGHES, W. Va., 15 S. E. Rep. 56.

95. PARTNERSHIP—Contribution.—Until there is a settlement of partnership matters, and a balance found in favor of one or the other partner, no cause of action for contribution exists in favor of one partner, who has paid a debt owed by the firm.—MCDONALD v. HOLMES, Oreg., 29 Pac. Rep. 735.

96. PARTY-WALLS.—Merely building a wall by one of two adjacent owners, and placing the same in equal proportions on each lot, does not make it a party-wall in absence of agreement to that effect.—OLDSTIEN v. FIREMAN'S BLDG. ASS'N, 10 South. Rep. 928.

97. PRINCIPAL AND SURETY.—Where a judgment is rendered against the principals and sureties on a bond, and a part payment made by one of the sureties is subsequently sought to be recovered from one of the principals, it is competent for defendant to prove an agreement between the judgment debtors and himself by which he was released from all liability.—RAWSON v. STUART, Oreg., 29 Pac. Rep. 792.

98. QUIETING TITLE—Possession.—Upon recovery of judgment in an action to quiet title "by a person out of possession," he is entitled to "a writ for the possession of the premises," under Code Civil Proc. § 380, regardless of any adverse title to the land since acquired by defendant, notwithstanding that his complaint did not allege that he was out of possession, defendant's answer alleging possession in himself, and although, after the recovery of such judgment, plaintiff dismissed an action of ejectment contemporaneously brought.—LANDREGAN v. PEPPIN, Cal., 29 Pac. Rep. 771.

99. RAILWAY AND TELEGRAPH COMPANIES—Alienation of Franchise.—Under the general rule that the grant of a franchise of a public nature is personal to the grantee and cannot be alienated without the consent of the government, the privilege granted to the Union Pacific Railway Company, by the acts of 1862 and 1864 of constructing and operating a telegraph line along its right of way, for public and commercial uses, carries with it a corresponding obligation on the part of the company to itself operate such line, and it had no authority to transfer the franchise to any other corporation.—UNITED STATES v. WESTERN UNION TEL. CO., U. S. C. C. (Neb.), 50 Fed. Rep. 28.

100. REMOVAL OF CAUSES—Condemnation Proceedings.—Code Civil Proc. N. D. § 3000, provides that in railroad condemnation proceedings either party may demand a jury trial within 30 days from the filing of the commissioner's report, but requires no further pleadings for such trial: Held, that for the purpose of removal to a federal court the demand for a trial by jury is equivalent to the filing of an answer in ordinary suits, and under Act Cong. March 3, 1887, § 3, the case will be remanded to the State court where the petition for removal was filed after the expiration of the 30 days thus allowed.—MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. NESTOR, U. S. C. C. (N. Dak.), 50 Fed. Rep. 1.

101. RES JUDICATA.—A purchaser of land, having applied for and obtained an injunction in a circuit court restraining the trustee from selling on account of an alleged cloud upon the title, and this court having on appeal reversed the circuit court, and decided that the alleged cloud and defect did not constitute sufficient ground for an injunction and dismissed the bill, the plaintiff cannot bring a second and precisely similar suit against the same parties for the same purpose and cause of action; and on a plea of *res judicata* the plea

was properly sustained.—KINPORTS v. RAWSON, W. Va., 15 S. E. Rep. 66.

102. SALE AND DELIVERY.—One who agrees to sell and deliver a certain amount of lumber for a certain sum, can, though failing to deliver the full amount, recover for the amount delivered, it being received and retained. — WILLAMETTE STEAM MILLS LUMBERING & MANUF'G CO. v. UNION LUMBER & SUPPLY CO., Cal., 29 Pac. Rep. 773.

103. SALE—Delivery.—Where goods are to be manufactured by a seller, and forwarded by a carrier to the buyer at a distance, the seller's delivery of such goods to the carrier as bailee for the purchaser passes the title, provided that the goods answer the requirements of the contract.—SMITH v. EDWARDS, Mass., 30 N. E. Rep. 1017.

104. SALE — Inspection before Acceptance. — Where fruit which was to be shipped from a distance was subject to inspection by the buyer before acceptance, and an opportunity for inspection was given within a reasonable time after arrival, which the buyer refused to make, it is no defense to an action for the price that an inspection was refused by the carrier immediately on the arrival.—HUDSON v. GERMAIN FRUIT CO., Ala. 10 South. Rep. 920.

105. SALE—Misrepresentations.—A sale of land is not invalidated by the fact that the purchaser represents it to be worth only about half as much as it really is, as such representations are statements merely of opinion, on which there may be wide differences, and about which the vendor has as full opportunity for information as the purchaser.—PEOPLE v. TYNON, Colo., 29 Pac. Rep. 809.

106. SALE—Title in Vendor.—Where a safe is sold on deferred payments, the title to remain in the vendor until full payment, but no record is made of such contract, and it is known only to the parties thereto, and the safe is delivered to the vendee, the contract is void as to the vendee's creditors, and the safe may be attached and sold for the vendee's debts.—WEBER v. DIEBOLD SAFE & LOCK CO., Colo., 29 Pac. Rep. 747.

107. SCHOOLS—Diversion of Funds. — An act which exempts from school taxation parents sending their children to a certain private school, and directs that such children's proportion of the school fund shall be paid to the teachers of the private school, but confers the privileges of the latter school only on children whose parents pay certain compensation to the principal thereof, is unconstitutional. — UNDERWOOD v. WOOD, Ky., 18 S. W. Rep. 405.

108. SPECIFIC PERFORMANCE.—A letter from a land company to a manufacturing company promising that, if they will locate a factory upon their property, they will donate to them a certain amount of land, and will promptly build or cause to be built to it a side track, sets forth the agreement in terms sufficiently certain to support a bill for specific performance. — SOUTHERN PINE FIBRE CO. v. NORTH AUGUSTA LAND CO., U. S. C. C. (S. Car.), 50 Fed. Rep. 26.

109. SPECIFIC PERFORMANCE.—A party seeking specific performance by a bill in equity must show himself to have been ready, desirous, prompt, and eager to perform the the contract on his own part. The unreasonable delay of the purchaser, which will preclude a decree for specific performance in his behalf, is dependent upon the circumstances of the particular case, and, if his conduct has indicated bad faith or a virtual abandonment of the contract, it will deprive him of all just claim to equitable interposition.—CLAY v. DESKINS, W. Va., 15 S. E. Rep. 85.

110. SPECIFIC PERFORMANCE—Parol Gift.—Where a son goes into possession of his father's land, and makes inexpensive improvements, it is not to be inferred therefrom, in the absence of other evidence, that the father gave the son the land. Neither are loose declarations of the father, without explanation, sufficient evidence of a gift. A contract between a parent and child, from the nature of the relation, requires to be proved by a kind of evidence much stronger than that which might suffice between strangers. The evidence, in case of a parol gift from father to child, should be direct, positive, express, and unambiguous, and its terms clearly defined.—HARRISON v. HARRISON, W. Va., 15 S. E. Rep. 87.

111. SUBROGATION.—A person who agrees to take up notes in payment of a lot, and which are a lien thereon, at the request of the maker, and on the understanding and promise that he will convey the lot to her upon payment of all the notes, becomes, in the event of the agreement falling through, subrogated to the lien of the notes which she has taken up.—HART v. DAVIDSON, Tex., 19 S. W. Rep. 454.

112. SUBROGATION. — Subrogation is a mode which equity adopts to compel the ultimate payment of a debt by one who, in justice and good conscience, ought to pay it, and is not dependent upon contract, privity, or strict surety.—EMMERT v. THOMPSON, Minn., 52 N. W. Rep. 31.

113. TAXATION—Banks.—Under Act 200, Pub. Acts 1891, § 2, declaring that a real estate mortgage shall be deemed an interest in land, for the purpose of taxation, and that bank shares shall only be assessed after deducting the value of real estate taxed to the bank, mortgages held by a bank must be taxed to the bank and deducted from the value of the shares of its capital stock, notwithstanding any provision whereby the mortgagors had agreed to pay the taxes.—LATHAM v. BOARD OF ASSESSORS OF CITY OF DETROIT, Mich., 52 N. W. Rep. 15.

114. TAXATION — Corporate Stock.— The collection of taxes assessed on the capital stock of a corporation, which are alleged to be excessive, will not be enjoined where the corporation does not offer to pay the taxes on the amount of capital stock it admits to be subject to taxation.—SMITH v. RUDE BROS. MANUF'G CO., Ind., 30 N. E. Rep. 947.

115. TAXATION — License — Agent.— The agent of the manufacturer of clocks in another State who takes orders for them in Louisiana, is not subject to the payment of a license tax.—MCCLELLAN, v. PETTIGREW, La., 10 South. Rep. 853.

116. TAX SALE — Notice. — Among other prerequisites to a valid sale of land for taxes is the giving of notice thereof; and, when it is shown that such notice has not been given in substantial conformity with the statute, the sale will be adjudged invalid, notwithstanding a tax deed in proper form may have been duly executed and recorded.—MORRIS v. ST. LOUIS NAT. BANK, Colo., 29 Pac. Rep. 802.

117. TELEGRAPH COMPANIES — Connecting Lines.— A telegraph company, upon a receipt of a message for transmission to a point beyond its line, sent it to defendant to be forwarded, and paid the latter one-half of the sum collected from the sender: Held, that defendant was liable for delay in delivering the message and the court erred in directing a verdict for defendant, on the ground that it was merely the agent of the other company. — SMITH v. WESTERN UNION TEL. CO., Tex., 19 S. W. Rep. 441.

118. TELEGRAPH COMPANIES — Penalty.—By the act of October 22, 1887, telegraph companies are subject to the penalty prescribed for not transmitting dispatches with due diligence, whether the persons to whom they are addressed reside within one mile of the telegraphic station, or within the city or town in which such station is located, or not. The proviso in the second section of the acts relates to the duty of delivery, and not to the duty of transmission. — HORN v. WESTERN UNION TEL. CO., Ga., 15 S. E. Rep. 16.

119. TRUST— Restraints on Alienation.— In this State the absolute power of alienation, as respects real estate, cannot be lawfully suspended by the creation of a trust for more than two lives in being. But as to personal property the common-law rule still prevails, and a trust therein may continue for one or more lives in being at the death of a testator, and 21 years and a

fraction.—IN RE TOWER'S ESTATE, Minn., 52 N. W. Rep. 27.

120. VENDOR AND VENDEE—Concellation of Contract. —A vendee was guilty of laches, and not entitled to the cancellation of a contract for the sale of land on the ground of the vendor's fraud, where after discovering such fraud, he made a payment on the contract, and waited more than two years, and till after the filing of a bill to enforce the vendor's lien, before disaffirming the contract.— HOWLE V. NORTH BIRMINGHAM LAND CO., Ala., 11 South. Rep. 15.

121. VENDOR AND VENDEE— Contract.— A deed granting a right of way to a railroad company, "in consideration of the enhanced value" to the grantor's other land by the construction of the road and the location of a station on the land granted, without provisions for a reversion on the non-performance of the conditions by the company, vested the title in the company, though it failed to maintain the station; and the grantor's remedy is by action for the breach of contract, rather than for the cancellation of the deed.— CHICAGO, T. & M. C. RY. CO. V. TITTERINGTON, Tex., 19 S. W. Rep. 472.

122. WILLS—Charitable Bequest. — A bequest in trust for the purpose of giving premiums for treatises on subjects conducive to the advancement of medical science, and for printing and distributing the treatises to which premiums shall have been awarded, is a valid charitable bequest. — PALMER V. PRESIDENT, ETC., OF UNION BANK, R. I., 24 Atl. Rep. 109.

123. WILL — Charitable Bequests. — Even if religious societies are not charitable or benevolent societies, within the meaning of Civil Code, § 1313, prohibiting bequests or devises to any "charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses," of more than one-third of the estate, where testator leaves legal heirs, a bequest to the boards of trustees of several churches of more than one-third of the estate, to be used by the trustees for missionary purposes, is a bequest in trust for charitable uses, within the prohibition of said section. —IN RE HEWITT'S ESTATE, Cal., 29 Pac. Rep. 775.

124. WILL — Construction. — A testator bequeathed to appellant "the interest on $1,000 during her natural life-time, the same to be paid to her annually." There was no bequest over, no direction for the investment of the money, and no appointment of a trustee to take care of it: Held, that appellant only took a life estate in the fund; the principal, after her death, going to the residuary legatee.— IN RE RITTER'S ESTATE, Pa., 24 Atl. Rep. 120.

125. WILLS — Construction.— Testator gave his property in trust, half the income to be paid A, and the other half to D and L during the life of A: Held, that the gift to D of one-fourth of the income during the life of A vested in him on the decease of testator, so that D dying during the life of A, his share of the income accrued and to accrue during A's life, so far, at least, as it arises from personalty, will go to his personal representative. — CLARKSON V. PELL, R. I., 24 Atl. Rep. 110.

ABSTRACT OF DECISIONS OF MISSOURI COURTS OF APPEAL.

ST. LOUIS COURT OF APPEALS.

CONTRACT—Reformation—Rescission.—To entitle one to a reformation of a fire insurance policy, it must be established, that both parties agreed to something different from what is expressed in the writing. For mistake on his own part the plaintiff's remedy is rescission and not reformation. Reversed.—STEINBERG V. PHOENIX INS. CO.

CRIMINAL LAW — Counts in Indictment.—Where two counts in an indictment are bad, the evidence and instructions being directed to those counts only, there being one good count and the jury failing to specify in their verdict on which count the conviction was had, the judgment should be reversed. Reversed. —STATE V. CASSITY.

CRIMINAL LAW— Indictment.— An indictment against a druggist which fails to state the name of the purchaser of liquor sold by him without prescription of a duly registered physician is bad even after verdict. Reversed.—STATE V. CASSITY.

INSURANCE—Change of interest.—Where an insurance policy provides that it shall be void upon any glance, other than the death of the insured, in the title or possession of the property, the death of the insured and the subsequent partition of the property under the will of the insured so changes the ownership as to avoid the policy. Reversed and certified to supreme court, being contrary to holding of Kansas City Court of Appeals in 38 Mo. App. 582.— TRABUE V. DWELLING-HOUSE INS. CO.

JUSTICE OF THE PEACE— Amendment of Statement— Denial of Counter-claim. — A statement as follows: "Springfield, Mo., March 16, 1888. J. B. Dr., to J. L., for work and labor, $129.32. H. Bros. Att's," is a sufficient statement to admit of amendment in circuit court. An amended counter-claim filed in the circuit court on an appeal from a J. P. is not admitted by neglect of denial. Affirmed.—LAMB V. BUSH.

MECHANIC'S LIEN—Account.—Where the account filed as the basis of a mechanic's lien, in a case between the original contractor and the owner states the whole contract price of the building in one item, this is not the "just and true account" required by the statute, but is worthless as the basis of a lien. Reversed.— NEAL V. SMITH.

PLEADING — Two Causes of Action in One Count.— Conceding that the trial court committed error in not causing the plaintiff to elect upon which of two causes of action stated in the same count he would proceed to trial, this is no ground for reversal if the plaintiff was only allowed to give evidence under one count, so that the defendant was not prejudiced by the error. Affirmed. — PINNELL V. ST. LOUIS, ARK. & TEX. R. R. CO.

PRACTICE—Contract—Evidence—Records.—The voluntary withdrawal of one count of a petition may be shown by parol evidence where the record does not distinctly show what was adjudicated in the prior action. Plaintiff may recover in one action a sum due for services rendered under a contract and then after the time has expired for the further performance of the contract sue the defendant for damages for failure to complete performance on his part. Reversed.—WEST V. MOSER.

PURCHASER WITHOUT NOTICE— When not a Good Defense.—Where G by mistake releases on the record a lien on the land of W, and W with knowledge of the mistake sells to M, a purchaser without notice, who gives his negotiable notes for the entire purchase money, and said notes remain in the hands of W unnegotiated, until G has brought her action to cancel the erroneous entry, and M has opportunity to enjoin the negotiation of the notes, M cannot avail himself of the fact that he was a purchaser without notice. Affirmed.—GREENLEE V. MARQUIS.

RAILROADS—Fencing Enclosed Land.—A wagon road with gates at each end passing through two farms and which has been traveled by the public for twenty years and which was so traveled at the time the railroad was built is *de facto* an highway, and the railroad is under no obligation to fence its track where such road crosses. Reversed.—ROBERTS V. RAILROAD.

TAX SALES— Right to Reimbursment on Failure of Title.—A purchaser at a tax sale whose title fails has at common law only a bare equity for reimbursment to the extent of money applied to the payment of taxes rightly assessed, which equity is not enforceable in the absence of statute on the subject. Missouri has no such statute. In respect to taxes paid subsequent to the purchase the purchaser is a mere volunteer, and has no rights. Affirmed.—CARTER V. PHILIPS.